DOCUMENT RESUME

ED 298 665 EA 020 357

AUTHOR Sendor, Benjamin B.
TITLE A Legal Guide to Religion and Public Education.
INSTITUTION National Organization on Legal Problems of Education, Topeka, Kans.
PUB DATE 88
NOTE 64p.
AVAILABLE FROM Publication Sales, NOLPE, Southwest Plaza, Suite 223, 3601 SW 29th, Topeka, KS 66614 ($14.50 plus $2.00 on each prepaid order).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Guides - Non-Classroom Use (055)

EDRS PRICE MF01/PC03 Plus Postage.
DESCRIPTORS Biblical Literature; *Church Role; Court Litigation; Elementary Secondary Education; Extracurricular Activities; Legislation; Policy Formation; *Public Schools; *Religion; Religious Factors; Religious Organizations; *State Church Separation

ABSTRACT

This book is designed to give readers a basic grasp of the general legal principles controlling the role of religion in public education, to apply those principles to typical church-state issues in the schools, and to equip readers to address other related issues as they arise. The book covers the following topics: (1) general legal principles; (2) noncurricular religious activity by students (school prayer, extracurricular student relgious clubs, prayers at special occasions, display of religious symbols, holiday observances, and Bible distribution); (3) religious objections to secular, noncurricular student activities; (4) religion and the curriculum (courses, religious objections to secular courses, and religious objections to secular instructional materials and methods); (5) religious activity by personnel (prayer, discussion of religion with students, wearing religious apparel or religious symbols, and leave for religious reasons); and (6) other religious activities on school grounds (prayer at school board meetings and the use of school facilities by outside groups). (SI)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED298665

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Thomas N. Jones

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

A Legal Guide to Religion and Public Education

Benjamin B. Sendor

EA 020 357

PUBLISHED BY
NATIONAL ORGANIZATION ON
LEGAL PROBLEMS OF EDUCATION

A Legal Guide to Religion and Public Education

Benjamin B. Sendor

1988

PUBLISHED BY
NATIONAL ORGANIZATION ON
LEGAL PROBLEMS OF EDUCATION
Southwest Plaza, Suite 223, 3061 Southwest 29th
Topeka, Kansas 66614

About the Author

BENJAMIN B. SENDOR received his J.D. degree from Harvard Law School. He is assistant professor of Public Law and Government, The University of North Carolina at Chapel Hill. Sendor has written numerous articles about church-state issues in public education and is the legal columnist for *The American School Board Journal*.

Copyright © 1988 by
National Organization on
Legal Problems of Education
All Rights Reserved
Printed in the U.S.A.

CONTENTS

INTRODUCTION / v

CHAPTER 1: General Legal Principles / 1

CHAPTER 2: Noncurricular Religious Activity by Students / 4
- A. School Prayer / 4
  - 1. Officially Sanctioned Prayer / 4
  - 2. Private Prayer / 5
  - 3. Moment of Silence / 5
- B. Extracurricular Student Religious Clubs / 6
- C. Prayers at Special Occasions / 13
  - 1. Graduation / 13
  - 2. Baccalaureate Services / 16
  - 3. Athletic Events / 16
- D. Display of Religious Symbols / 17
- E. Holiday Observances / 19
- F. Bible Distribution / 20
- G. Conclusion / 20

CHAPTER 3: Religious Objections to Secular, Noncurricular Student Activities / 22

CHAPTER 4: Religion and the Curriculum / 23
- A. Courses or Course Segments About Religion / 23
- B. Religious Objections to Secular Courses / 31
  - 1. Evolution and Creationism / 31
  - 2. Sex Education / 36
- C. Religious Objections to Secular Instructional Materials and Methods / 37
- D. Conclusion / 43

CHAPTER 5: Religious Activity by Personnel / 44
- A. Prayer / 44
- B. Discussion of Religion with Students / 45
- C. Wearing Religious Apparel or Religious Symbols / 46
- D. Leave for Religious Reasons / 47

CHAPTER 6: Other Religious Activities on School Grounds / 50
- A. Prayer at School Board Meetings / 50
- B. Use of School Facilities by Outside Groups / 50

APPENDIX I. The Equal Access Act / 52

APPENDIX II. Map of the Thirteen Federal Judicial Circuits / 54

INDEX / 55

STATUTES CITED / 56

CASES CITED / 56

INTRODUCTION

Few issues in education strike the public's emotional chords as strongly as the role of religion in the public schools. When questions about religion arise, school officials often find themselves working in an unwelcome spotlight, trying to satisfy three occasionally conflicting masters—public sentiment, legal duty, and their own beliefs. This book is designed to help officials in America's public schools deal with this difficult matter by introducing them to the law governing church-state issues in public education. It does not seek to answer every question that might arise about religion in the schools. Instead, its purpose is to give readers a basic grasp of the general legal principles controlling the role of religion in public education, to apply those principles to typical church-state issues in the schools, and to equip readers to address other specific issues as they arise.

This monograph cannot replace the sound advice of an experienced school board attorney on thorny legal questions. I hope, however, that it succeeds in its goal of giving school officials sufficient understanding and information to enable them to avoid common church-state problems through prudent policy development and implementation and to work effectively with attorneys when necessary.

The monograph includes as an appendix a map of the United States showing the geographic areas comprising the thirteen federal judicial circuits. The map should help readers determine which federal appellate court decisions govern the law in their areas.

An earlier version of this monograph was published as a chapter in *Education Law in North Carolina* (Chapel Hill: Institute of Government, The University of North Carolina at Chapel Hill, 1988) and is reprinted by permission of the Institute of Government. Minor changes were made for this publication. I am grateful for the helpful editorial assistance of my colleagues Robert Phay, Margaret Taylor, and Janine Murphy, and for the assistance of the publications production staff of the Institute of Government.

Chapter 1

GENERAL LEGAL PRINCIPLES

The very first clauses of the First Amendment set forth the fundamental legal principles regulating the relation between government and religion. About that relation, the First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." As this language shows, the First Amendment contains two distinct provisions restricting government authority over religion: the establishment clause and the free exercise clause. The Fourteenth Amendment, as interpreted by the United States Supreme Court, extends these limits on governmental power to state and local governments, including school districts, their officials, and their employees.[1]

The purpose of the free exercise clause is to prevent the government from impairing the liberty of individuals to exercise their religious faith. The clause governs conflicts between religious faith and government actions that through coercion make it more difficult to hold the beliefs and engage in the practices of such faith.[2] It provides absolute protection for freedom to hold religious beliefs but only qualified protection for freedom to engage in religious activities.[3] To resolve disputes over government interference with faith, courts weigh the strength of a person's interest in exercising the beliefs or practices in question, the strength of the government's interest in a policy that limits the exercise of faith, and the degree of burden imposed by the limitation.[4] If a governmental policy interferes with the person's freedom to exercise his faith, the government agency must show that its interest in enforcing the policy is sufficiently compelling to override the person's religious rights and that the policy represents the least restrictive way of fulfilling the government's interest.[5]

---

1. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 215-16 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberties embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

2. Wisconsin v. Yoder, 406 U.S. 205 (1972).

3. Sherbert v. Verner, 374 U.S. 398 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

4. Wisconsin v. Yoder, 406 U.S. 205 (1972).

5. Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). As Justice O'Connor has observed, the Supreme Court also has articulated other, similar analyses

The purpose of the establishment clause is to enforce government neutrality concerning religion by separating the realms of church and state. The clause shapes the relation between government and religion according to these principles:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.[6]

The Supreme Court has developed a three-part test (known colloquially as the *Lemon*[7] test) to judge challenges to government acts on the basis of the establishment clause: (1) the governmental act that bears on religion must reflect a clearly secular purpose, (2) it may neither advance nor inhibit religion as its primary effect, and (3) it must avoid excessive government entanglement with religion.[8] The act must pass all three parts of the test in order to comply with the establishment clause.[9] Although the test is not a rigid, mechanical procedure that yields predictable and unassailable answers in concrete cases,[10] it guides courts in their review of religious activities in public schools.

Constitutional debates over the role of religion in the public school curriculum often involve a complex interplay between the free exercise and establishment clauses. As explained above, each clause serves a different purpose: the goal of the free exercise clause is to keep religious faith voluntary—free from government coercion—while the goal of the establishment clause is to prevent excessive government involvement in religion. This distinction becomes important in analyzing controversies over religious activity in public schools. The Supreme Court has stressed that a provision that makes a government-supported religious practice optional might save the practice from a challenge under the

---

of the free exercise clause. *See* Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046 (1987); Goldman v. Weinberger, 106 S. Ct. 1310, 1324 (1986) (O'Connor, J., dissenting).

6. Epperson v. Arkansas, 393 U.S. 97, 103-4 (1968).

7. Lemon v. Kurtzman, 403 U.S. 602 (1971).

8. *Id.* at 612-13. In her cogent concurring opinion in Lynch v. Donnelly, 465 U.S. 668, 687 (1984), Justice O'Connor explained the functions of the first and second parts of the *Lemon* test as follows:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Id. at 690.

9. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

10. Lynch v. Donnelly, 465 U.S. 668 (1984).

free exercise clause but not from a challenge under the establishment clause.[11] Thus a student's voluntary participation in public school religious activity would not violate his rights under the free exercise clause. However, the voluntary nature of his participation is irrelevant to the establishment clause, which concerns what government (acting in the form of the school administration) does. Even if all students in a class and their parents approved of a religious activity in school, the activity still could violate the establishment clause if it entailed excessive government involvement in religion. The result is different with respect to religious objections to a government-supported secular practice. If the activity is voluntary, its optional nature would save it from a challenge under the free exercise clause, and its secular nature would save it from a challenge under the establishment clause. With these fundamental principles of First Amendment law concerning religion in mind, we can consider the constitutional dimensions of religious activity in the public schools.

11. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 220-23 (1963); Engel v. Vitale, 370 U.S. 421, 429-30 (1962).

Chapter 2

NONCURRICULAR RELIGIOUS ACTIVITY BY STUDENTS

A. School Prayer

1. Officially Sanctioned Prayer. The United States Supreme Court decisively grappled with the constitutionality of officially sanctioned, audible prayer and Bible reading in public school classrooms in 1962 in *Engel v. Vitale*[12] and again the following year in *School District of Abington Township v. Schempp*.[13] In *Engel* the Court held that the New York public schools' daily classroom recitation of a nondenominational prayer composed by the state government violated the establishment clause. The law that provided for the devotional permitted students to be excused from prayer upon parental request. In *Schempp* the Court held unconstitutional, under the establishment clause, a Pennsylvania statute requiring that at least ten Bible verses be read aloud to students without comment at the start of each school day and also a Baltimore policy requiring the recitation of either the Lord's Prayer or a chapter of the Bible without comment at the start of the school day. In both cases the Court found that the laws, policies, and practices at issue failed the first two parts of the three-part test: they had religious purposes, and they advanced the religious beliefs contained in the Bible and in the challenged prayers.[14]

In each case the Court rejected the assertion that the excusal provisions saved the prayers and the Bible readings. As discussed above, the Court explained that while an effective excusal policy might prevent a religious practice from violating the free exercise clause, it would not save the activity from violating the establishment clause.

Since the *Engel* and *Schempp* decisions, courts across the nation have reviewed statutes and policies that provide for school prayer but also provide greater voluntariness than the policies rejected in those cases. For example, the Supreme Judicial Court of Massachusetts reviewed a statute requiring teachers to announce at the beginning of each school day a period of prayer to be led by

12. 370 U.S. 421 (1962).

13. 374 U.S. 203 (1963).

14. Although the Supreme Court did not fully articulate the three-part test until 1971 in Lemon v. Kurtzman, 403 U.S. 602, the Court's opinions in *Engel* and *Schempp* rested on grounds that would later become the first two parts of the *Lemon* test.

a student volunteer; the law contained an excusal policy.[15] The United States Court of Appeals for the Fifth Circuit considered a Louisiana statute authorizing local school boards to permit school officials to allow each classroom teacher to ask at the start of the school day whether any student wished to offer a prayer.[16] If no student volunteered, the statute permitted the teacher to offer the prayer. It too had an excusal provision. The United States Court of Appeals for the Ninth Circuit reviewed an Arizona high school's policy that permitted student council officers to conduct student assemblies in the auditorium during the school day and to begin the assemblies with a prayer.[17] School officials coordinated class schedules to accommodate the assemblies. Attendance at the assemblies was optional; students who did not attend were assigned to study hall.

In all three cases, the courts declared the challenged practices unconstitutional under the establishment clause, finding that the activities failed all parts of the three-pronged test. They also rejected the argument that the optional nature of the practices saved them from being constitutional violations. Heeding the Supreme Court's lesson in *Engel* and *Schempp*, the courts explained that the voluntary nature of a religious practice does not shield the activity from violating the establishment clause.

2. Private Prayer. In considering Alabama's moment-of-silence law (see the next section), the United States Supreme Court made an important point, one often lost in the heated debate over school prayer: Courts have not banished prayer from the schools, as some critics have charged.[18] They have forbidden only officially sanctioned or officially sponsored prayer. The establishment clause does not prohibit students from praying silently or audibly on their own free time during the school day (such as during lunch or recess), if the prayers are totally voluntary and unofficial and do not interfere with other students, teachers, or official school activities.[19] A student with free time during the school day has as much right to pray privately as to ponder a coming test or last night's baseball scores.

3. Moment of Silence. After the *Schempp* decision, the question arose whether an officially sanctioned moment of silence would be constitutional under the establishment clause. Most of the courts that considered the practice ruled that it was unconstitutional.[20] The Supreme Court finally addressed the ques-

---

15. Kent v. Commissioner of Educ., 380 Mass. 235, 402 N.E.2d 1340 (1980).
16. Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981).
17. Collins v. Chandler United School Dist., 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981).
18. Wallace v. Jaffree, 105 S. Ct. 2479 (1985).
19. *Id.* at 2491. *See also id.* at 2505 (O'Connor, J., concurring).
20. *Compare* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 105 S. Ct. 2479 (1985); Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 103 (D.N.M. 1983); and Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982) (striking down statutes requiring or authorizing a daily moment

11

tion in 1985 in *Wallace v. Jaffree*.[21] Although the Court struck down the Alabama moment-of-silence statute at issue in that case, it indicated that a properly worded statute (or regulation) could comply with the establishment clause.

The statute struck down by the Court authorized public school teachers in all grades to announce a one-minute period of silence for "meditation or voluntary prayer." The legislative history showed that the sole purpose of the law's sponsor was to return state-sanctioned prayer to the public schools. In addition, the Court observed that an earlier statute directed teachers of all grades through the sixth to enforce a one-minute period of silence for "meditation." It concluded that by adding the words "or voluntary prayer" in the later statute, the legislature signaled its intent to identify prayer as a favored way for students to use the period of silence. That endorsement of prayer violated the establishment clause, the Court ruled.

Although it rejected the contested Alabama statute, the Court indicated that a moment-of-silence statute adopted for at least some genuine secular purpose (such as beginning the school day with fitting solemnity) and worded in a way that would not favor prayer would not offend the establishment clause. For example, a statute authorizing a period of "meditation," or simply a period of silence, probably would be constitutional. Such a statute would permit students to use the period for any type of silent reflection they choose to engage in—including prayer—without suggesting or directing them to choose a particular type of reflection. Students could pray or think about any other topic they select.[22]

B. Extracurricular Student Religious Clubs

Some students have sought to form extracurricular clubs to engage in religious activities, including prayer, at school. The constitutionality of extracurricular student religious clubs has been a thorny question for courts, Congress, and school officials. The main argument voiced by proponents of such clubs is that school officials would not be endorsing religion merely by permitting students to form voluntary, student-initiated religious clubs as only one of several

---

of silence) *with* Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976) (three-judge court) (upholding a statute and local school board resolution requiring a daily moment of silence).

21. 105 S. Ct. 2479 (1985).

22. *Id.* at 2491. A number of states have enacted such statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-522 (West 1984); CONN. GEN. STAT. ANN. § 10-16a (West 1986); N.C. GEN. STAT. § 115C-47(29) (1987). In May v. Cooperman, 780 F.2d 240 (3d Cir. 1985), *appeal dismissed sub nom.*, Karcher v. May, 108 S. Ct. 388 (1987), the United States Court of Appeals for the Third Circuit struck down a New Jersey statute requiring principals and teachers to permit a one-minute period of silence at the beginning of each school day "to be used solely at the discretion of the individual student . . . for quiet and private contemplation or introspection." The court found that the statute did not improperly advance or inhibit religion as its primary effect and that it did not unduly entangle school authorities in religious affairs. But it upheld a lower court finding that the legislative history of the statute showed that it had an unlawfully religious purpose.

kinds of extracurricular groups. Opponents argue that in the eyes of impressionable primary and secondary school students, official authorization and supervision of such clubs would put the school unit's stamp of approval on their activities.

Prior to the enactment of the federal Equal Access Act (EAA) in 1984, courts around the nation tended to bar such clubs as violating the establishment clause. In 1965 a federal court in Michigan[23] upheld a school policy to permit voluntary student prayer meetings for a few minutes before the start of classes, if the sessions were not held in home rooms and if the teachers had no role in selecting the prayers. The court reasoned that such voluntary gatherings, separate from both official school activities and teachers' control over the content, were a lawful accommodation of government with religion. However, courts in three more recent cases—*Brandon v. Board of Education of Guilderland*,[24] *Johnson v. Huntington Beach Union High School District*,[25] and *Trietley v. Board of Education of the City of Buffalo*[26]—agreed that extracurricular religious clubs violated the establishment clause. They reached identical conclusions through slightly different analyses under the three-part *Lemon* test. The *Brandon* and *Johnson* courts ruled that policies permitting the clubs would have the secular purpose of demonstrating a neutral school attitude toward extracurricular activities. On the other hand, the *Trietley* court focused on the activity of a prayer club, rather than on the school extracurricular policy authorizing the formation of the club, and decided that the club's purpose was religious.

The three courts agreed that the clubs would violate the second and third parts of the touchstone test. They found that the groups would, as their primary effect, advance the religious beliefs of their members. The courts also determined that the groups would require excessive entanglement of school officials with religion because supervision by teachers would be necessary for such purposes as ensuring safety and order, ensuring that activities during club meetings are voluntary, preventing discriminatory membership policies, and auditing club financial records.

In 1981 the Supreme Court added a new constitutional perspective to the debate by holding in *Widmar v. Vincent*[27] that the First Amendment's guarantee of freedom of speech required a public university in Missouri to allow students to form prayer clubs on campus. Though the university argued that the presence of prayer groups would violate the establishment clause, the Court ruled that allowing the clubs would pass the familiar three-part test. It first stated that opening a public university campus to prayer groups would serve

23. Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965).
24. 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).
25. 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (Cal. Ct. App.), *cert. denied*, 434 U.S. 877 (1977).
26. 65 App. Div. 2d 1, 409 N.Y.S.2d 912 (N.Y. App. Div. 1978).
27. 454 U.S. 263 (1981).

a neutral, secular policy of maintaining the campus as an open forum for the exchange of ideas. The Court then held that any benefits to religion would be merely "incidental" consequences rather than primary effects of the clubs because "an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices"[28] and because any impact of such a club on a campus with over 100 recognized student groups would be minimal. Significantly, the Court noted with regard to the effect of university prayer groups that "[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."[29] Third, the Court found that excluding religious clubs from a public university campus would risk greater entanglement than admitting them, because such an exclusion would mean that all extracurricular groups would have to be policed to ensure that they do not engage in religious activities. The Court also noted that college students often live on campus, with little chance of finding suitable places to worship off campus.

What is the impact of *Widmar* on the constitutionality of public school prayer clubs? At first glance, it might seem that *Widmar* overrules *Brandon*, *Johnson*, and *Trietley*. Indeed, in *Bender v. Williamsport Area School District*[30] a federal district court in Pennsylvania held that *Widmar* applies with equal force to public high school prayer clubs. That court ruled that students' freedom of speech under the First Amendment entitled them to meet for prayer, rejecting the school district's argument that allowing prayer groups to meet would violate the establishment clause. Using the three-part test, the court decided that (1) allowing the club to meet would serve the secular purpose of maintaining an open, neutral extracurricular policy; (2) high school students are mature enough not to interpret the school's acceptance of the club as tacit endorsement of the group's religious doctrines and practices; and (3) supervision by a teacher would entail no more governmental entanglement with religion than a policeman's patrolling of a religious rally in a public park.

The United States Court of Appeals for the Fifth Circuit took the opposite tack. It ruled in *Lubbock Civil Liberties Union v. Lubbock Independent School District*[31] that even after *Widmar*, prayer meetings in public schools violate the establishment clause. Also using the three-part test, the court decided first that

28. *Id.* at 274.

29. *Id.* at n.14.

30. 536 F. Supp. 697 (M.D. Pa. 1983).

31. 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983). *See also* Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984) (*per curiam*). Like the *Lubbock* court, the court in *Nartowicz* examined the school board's permission for student religious club meetings in the context of substantial school support of other religious activities. In Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985), the court held that the establishment clause prohibits extracurricular student religious clubs in elementary schools.

the school district's policy authorizing prayer meetings was not merely a neutral policy granting equal, open access to extracurricular groups; rather, it was part of a comprehensive policy concerned with religious activities in school, and the school board's purpose in promulgating the policy was to promote religious meetings. The court then concluded that the policy's primary effect was to advance religion. It reasoned that allowing prayer meetings as part of an official extracurricular program would imply official approval of the meetings to impressionable secondary school students.[32] The court distinguished *Widmar* as applying to more mature college students. Finally, it ruled that the policy entailed excessive governmental entanglement with religion through the teacher supervision required to protect school property and ensure that the activities of prayer clubs were voluntary.

Agreeing with the Fifth Circuit's *Lubbock* decision, the United States Court of Appeals for the Third Circuit reversed the district court ruling in *Bender*.[33] However, on a narrow technical ground unrelated to the constitutional merits of the case, the United States Supreme Court reversed the Third Circuit's decision in *Bender*.[34] The Supreme Court's decision leaves the district court ruling in *Bender* in effect for central Pennsylvania without approving it.

As the three conflicting decisions in the *Bender* and *Lubbock* cases demonstrate, *Widmar* leaves the law about extracurricular religion clubs in public schools unclear. Some of the comments in the *Widmar* opinion suggest that the Supreme Court would strike down religious clubs below the college level. The Court's observations in *Widmar* that college students are less impressionable than younger students[35] and that college students living on campus often have no suitable off-campus alternative for group prayer suggest that it would distinguish between colleges and public schools. In addition, the Court declined to review both *Brandon* and *Lubbock* after its decision in *Widmar*, allowing those decisions to stand on the heels of *Widmar*.

---

32. A distinction based on the age of the audience is familiar in establishment clause analysis. For example, although the United States Supreme Court has ruled that officially sanctioned prayer at the start of a school day is unconstitutional, it also has ruled that legislatures and public governing boards may begin their sessions with prayer. *See* Marsh v. Chambers, 463 U.S. 783 (1983).

33. 741 F.2d 538 (3d Cir. 1984). The Third Circuit based its decision on the second and third parts of the *Lemon* test; it found that allowing the religious club to meet would improperly advance religion by signaling school endorsement of the club and would unduly entangle school officials in religion through the monitoring of the club that would be necessary.

34. 106 S. Ct. 1326 (1986). By a 5-4 vote, the Supreme Court ruled that the former school board member who appealed the district court's decision to the Third Circuit lacked legal capacity ("standing") to bring the appeal. Consequently, the Third Circuit lacked jurisdiction to consider the appeal. The Court vacated the Third Circuit's decision, thereby leaving the district court's ruling intact without affirming that court's reasoning. The four dissenting justices argued that the Court should have affirmed outright the district court's decision to permit the religious club.

35. It is interesting to note that Justice Powell, the author of the *Widmar* majority opinion, contended in his dissenting opinion in *Bender* that high school students—though perhaps not younger students—are mature enough to appreciate the neutrality of an open-door extracurricular policy. 106 S. Ct. 1326, 1339 (Powell, J., dissenting).

Despite the clear trend among courts to prohibit extracurricular religious clubs as a violation of the establishment clause, Congress passed the Equal Access Act in 1984.[36] This legislation pitted Congress against the majority of courts over the legality of such clubs. The Supreme Court sidestepped the opportunity to resolve this conflict by deciding *Bender* without reference to the key constitutional issues.

EAA provides that if a public high school[37] that receives federal aid allows one or more "noncurriculum related" extracurricular student groups to meet on school grounds, it must grant a fair opportunity ("equal access") to all such student groups without discriminatory prohibition of any such group "on the basis of the religious, political, philosophical, or other content" of views expressed during group meetings. The basic thrust of EAA is to codify *Widmar* for the public high school: once a high school allows some groups to meet for purposes not related to curriculum, it may not deny permission to other such student groups to meet.

It is important to grasp the broad scope of EAA. Although it was introduced to give access to student religious groups, as finally enacted the bill grants access to all types of extracurricular groups, including political and philosophical groups as well as religious groups. Thus it applies to Young Socialists and Young Gays as well as Young Christians. EAA applies to mainstream and controversial fringe groups alike. A school that allows a Methodist student prayer group or a student Young Democrats group to meet may not, on the basis of its members' views, bar a student Hare Krishna chanting group or a student socialist group from meeting.[38]

Note that EAA applies only to schools that already permit noncurriculum-related groups to meet during noninstructional time. That is, a school that does not allow any such groups to meet is exempt from EAA. Only schools that allow some such groups to meet must open their doors to other such groups. The bill defines a noncurriculum-related group as one with activities "not directly related to the school curriculum." This skeletal definition places on school boards the burden of distinguishing between curriculum- and noncurriculum-related groups. The task is difficult. While some types of groups plainly are related to the curriculum (e.g., a language club, an athletic team, and a literary magazine), others seem to be noncurricular, though they are not easily categorized (for example, a service club or a chess club).

Boards that wish to exempt their high schools from EAA may either ban all "noncurriculum-related" groups or define "curriculum-related" broadly

36. Pub. L. No. 98-377. A copy of the statute is included as an appendix.

37. EAA expressly applies to "secondary schools" and defines that term to mean "a public school which provides secondary education as determined by state law."

38. Particular characteristics of some groups, such as discriminatory membership policies, might justify school officials' refusal to allow meetings under EAA. This question will be discussed below.

enough to encompass all existing nonreligious, nonpolitical, and nonphilosophical groups.[39] But they should realize that the definition of "curriculum-related" is not infinitely elastic. A board that makes unreasonable distinctions among groups would violate students' free speech and EAA rights and invite a civil rights lawsuit brought by students under 42 U.S.C. § 1983 (the Civil Rights Act of 1871) to enforce their rights.[40] For example, a board that classifies all political clubs except a student socialist club as curriculum-related would violate the free speech and EAA rights of the student socialists.

The act defines noninstructional time as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." This definition on its face includes periods before the first class and after the last class; it might exclude other periods during the school day, such as lunch and study hall.[41] Accordingly, EAA probably requires equal access only if some noncurriculum-related groups meet before or after the instructional day.

If EAA applies to a school, the school must satisfy a number of conditions to comply with the act's mandate: (1) a permitted group must be initiated by students and have voluntary attendance policies; (2) the school may not sponsor any such groups, although it may pay incidental costs of providing space, lighting, and heat;[42] (3) school employees may not participate in meetings, although an employee may be assigned solely to maintain discipline;[43] (4) meet-

39. Some boards might wish to exempt their high schools from EAA simply because they oppose noncurriculum-related extracurricular groups; other boards might choose to do so because they believe that the establishment clause prohibits extracurricular religious clubs. Such boards might prohibit all noncurriculum-related groups in order to steer a narrow course of compliance with both the establishment clause and EAA. Finally, some boards, while willing to permit meetings of mainstream noncurriculum-related groups, might nevertheless seek exemption from EAA in order to keep controversial or fringe noncurriculum-related groups out of school.

40. *See* CHRISTIAN LEGAL SOCIETY, THE EQUAL ACCESS ACT: IMPLICATIONS FOR SECONDARY SCHOOL POLICIES 41 (Oak Park, Ill. 1984).

41. If EAA does not apply to periods during the instructional day, such as lunch and study hall, then school officials could permit some noncurriculum-related clubs to meet and prohibit others from meeting without violating EAA. Thus EAA would allow school authorities to permit the chess club to meet during the lunch period and still ban a political or religious club from meeting at that time. Note, however, that if the reasoning of *Widmar* applies to high schools, then the free speech clause of the First Amendment—without regard to EAA—would prohibit such distinctions among types of noncurriculum-related clubs.

42. EAA does not fully describe what types of support by school officials would constitute prohibited "sponsorship" other than "promoting, leading, or participating in a meeting" [§ 803(2)]. Such sponsorship conceivably could include financial subsidies, extra credit for students who participate in clubs, and even announcements of club activities by school employees. It is not clear whether allowing notices of club activities to be posted on bulletin boards or published in the school newspaper would constitute sponsorship. A ban of such student-initiated forms of notice could violate the right of students to freedom of speech if it singles out only certain clubs for such a prohibition. *See* Tatel, Mincberg, & Middlebrooks, *An Introduction to the Equal Access Act*, 21 EDUC. L. REPORTER 7, 10-11 (Jan. 10, 1985); *see* CHRISTIAN LEGAL SOCIETY, *supra* note 40, at 30.

43. Although Section 802(c)(3) of EAA prohibits participation of employees only in religious groups, §§ 802(c)(2) and 803(2) prohibit participation by employees in all categories of noncurriculum-related groups, except to maintain discipline. Some commentators have questioned whether Congress intended to prohibit employee participation in nonreligious groups, despite the

ings may not interfere with educational activities; and (5) outsiders may not direct or regularly attend meetings.[44]

Despite its broad scope and strict conditions, EAA allows school officials to retain authority over several important facets of extracurricular student activity. It does not affect school control over curriculum-related groups. Also, the act does not require schools to allow student meetings that are otherwise unlawful, such as disruptive or violent gatherings. School officials still have authority to keep order and protect the welfare of students and employees. But they may not ban a meeting out of concern for possible disruptive conduct without specific, reliable evidence that disruption is likely to occur; a group may not be prohibited from meeting solely on the ground that its members express controversial or unpopular views.[45] Furthermore, officials probably may ban groups with discriminatory or secret membership policies.[46] Finally, EAA does not significantly affect school officials' control over access of nonschool community groups to school facilities.[47]

EAA conflicts with decisions of most courts that have addressed the constitutionality of extracurricular student religious clubs. No court has yet squarely decided whether EAA is constitutional in regard to religious groups. Note that

---

plain language of Section 803(2). *See* Tatel et al., *supra* note 43, at 11; AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, EQUAL ACCESS: INTERPRETATION AND IMPLEMENTATION GUIDELINES 7 (Arlington, Va. 1984).

44. Although EAA forbids control or regular attendance by outsiders, it does not state whether and to what extent a group covered by the act may be affiliated with outside organizations. It is conceivable that some forms of affiliation could result in control of a student group by outsiders, in violation of EAA. In Student Coalition for Peace v. Lower Merion School Dist., 776 F.2d 431 (3d Cir. 1985), the United States Court of Appeals for the Third Circuit interpreted EAA's prohibition of regular attendance by outsiders. In that case a high school student group sought permission to conduct a peace rally on campus and to invite members of the public to the event. The court pointed out that EAA does not prohibit occasional attendance of student meetings by outsiders. The court ruled that if school officials followed a policy of barring all outsiders from even occasional participation in extracurricular student activities, then it could bar outsiders from the peace rally. But if officials permitted some student groups to invite outsiders to their activities, then EAA would extend the same right to the student peace group.

45. *See generally* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

46. Regarding discriminatory groups, *see* Knights of Ku Klux Klan v. East Baton Rouge Parish School Bd., 578 F.2d 1122 (5th Cir. 1978); Cason v. City of Jacksonville, 497 F.2d 949 (5th Cir. 1979); National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973). The courts in these cases held, in pertinent part, that the discriminatory membership policies of particular adult political groups did not justify school boards' decisions to deny these groups access to public school facilities for meetings. However, the courts in *Ringers* and *Cason* distinguished between off-campus membership and attendance at an on-campus meeting. The courts suggested that a school board could deny access to a group that admits members of the public to an on-campus meeting on a discriminatory basis. *See Ringers*, 473 F.2d at 1018; *Cason*, 497 F.2d at 954. In the case of an extracurricular student group, both membership and attendance of meetings occur on campus, and a board therefore probably could ban student groups that discriminate with respect to either membership or attendance. With respect to secret societies, *see* Passel v. Fort Worth Indep. School Dist., 453 S.W.2d 888 (Tex. Ct. App. 1970); Robinson v. Sacramento City Unified School Dist., 53 Cal. Rptr. 781 (Cal. Ct. App. 1966).

47. *See infra* notes 139-43 and accompanying text.

the conflict pertains only to religious groups; therefore school officials in all jurisdictions should heed the congressional directive concerning equal access for nonreligious groups. Still, given the conflict over religious groups, officials must decide whether to obey Congress or the courts in regard to those groups. Officials in jurisdictions governed by courts that have prohibited extracurricular religious clubs should follow those courts' rulings and bar such clubs. Officials elsewhere should obey the congressional directive unless and until the courts in their jurisdiction rule otherwise.

Try a factual twist on the prayer club cases. Would it be constitutional to allow students to meet in prayer groups that are independent of a school's official extracurricular program? For example, could students form a prayer group that met at the school during evening, nonschool hours? Probably yes. Courts around the country have upheld policies permitting religious congregations to use school facilities for worship during nonschool hours on the same basis as nonreligious groups. Courts in Kansas and New Jersey have ruled that such policies have the secular purpose of maintaining school facilities as open forums for community activities during nonschool hours, that activities under such policies are sufficiently divorced from the official activities during the school day to avoid the implication of official school support, and that such open-door policies require no entangling supervision by school officials.[48] Accordingly, students who may not meet in official extracurricular prayer groups during the school day nevertheless should be able to meet on school grounds for prayer if their groups meet wholly independently of the official school curricular and extracurricular program on the same basis as any outside group (for a full discussion of use by outside groups, see Chapter 6, Section B).

C. Prayers at Special Occasions

1. Graduation. Courts around the nation have not reached a consensus on the constitutionality of this practice. In four cases, courts have upheld graduation prayer as constitutional. In *Grossberg v. Deusebio*[49] a federal district court upheld the use of prayer for an invocation at a Virginia high school graduation. Attendance at graduation was voluntary, and the senior class paid the expenses of the ceremony and decided whether to include an invocation in the program. The court acknowledged that an invocation is a religious act with the effect of advancing religion and that a graduation ceremony held on school grounds is an official public school event. But it distinguished graduation invocations from the prayers struck down in *Engel* and *Schempp* by noting that the forbid-

48. Country Hills Christian Church v. United School Dist. No. 512, 560 F. Supp. 1207 (D. Kan. 1983); Resnick v. East Brunswick Township Bd. of Educ., 77 N.J. 88, 389 A.2d 944 (1978). *See also* Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697, 700 (Fla. 1959).

49. 380 F. Supp. 285 (E.D. Va. 1974).

den prayers were part of the regular curricular program, supervised by teachers, with the purpose of supporting religious principles. In contrast, the court said, a graduation invocation is not a repetitive part of the year-long school program, and the overall graduation is a ceremonial rather than educational or religious activity. No state funding was required for this commencement exercise and the invocation lasted only a few minutes, posing "only a shadow of a danger" and causing no significant appearance of government support for religion.

In *Wood v. Mt. Lebanon Township School District*[50] and *Weist v. Mt. Lebanon School District*,[51] Pennsylvania courts upheld the use of both invocation and benediction prayers in a graduation. In each case, as in *Grossberg*, attendance at the graduation was voluntary. However, the school board adopted the program for the ceremony. As in *Grossberg*, the courts explained that graduation prayer was not part of the formal daily curricular routine enforced through compulsory attendance and was at worst a harmless "technical infringement." The federal district court declared in *Wood* that the prayer had a secular purpose of permitting "customary remarks."

In the fourth case, *Stein v. Plainwell Community Schools*,[52] a federal district court upheld the recitation of prayers as invocations and benedictions in high school graduations in two Michigan communities. The practice in one school called for delivery of a brief invocation and benediction by a graduating senior, with no censorship of the prayers by school administrators. The custom in the other school called for recitation of an invocation and a benediction by a member of the clergy selected by representatives of the graduating class. Administrators did not preview the prayers, but the minister was asked to keep them brief and "nondenominational." In upholding these practices, the court stressed four factors: attendance at graduation is voluntary; the presence of parents and other adults minimizes the proselytizing potential of the prayers; the prayers are isolated events that take only a few moments once a year, rather than daily rituals; and no evidence suggested that speakers had intended to use prayers to promote particular religious beliefs.

On appeal, the United States Court of Appeals for the Sixth Circuit ruled that "nonsectarian" and "nonproselytizing" prayers could be delivered as invocations. The court based its decision on the public nature of graduation, the buffering presence of parents, and the fact that graduation exercises are merely ceremonial functions rather than instructional activities designed to transmit knowledge or values. In this particular case, however, the court found that

50. 342 F. Supp. 1293 (W.D. Pa. 1972).
51. 457 Pa. 166, 320 A.2d 362, *cert. denied*, 419 U.S. 967 (1974).
52. 610 F. Supp. 43 (W.D. Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987).

the prayers recited violated the establishment clause because of their expressly Christian content.

Three other courts have held that graduation prayer violates the establishment clause. A federal district court in Iowa struck down the traditional practice of beginning and ending high school graduation exercises with a prayer offered by a local Christian minister.[53] It rested its decision on three grounds. First, since prayer is "perhaps the quintessential religious practice of many of the world's faiths," it plainly has a religious purpose, thereby failing the first part of that test. Second, the court concluded that Christian prayer promotes the Christian faith as its primary effect and thereby violates the second part of that test. Third, the court regarded prayer incident to children's participation in the educational setting of a public school graduation as significantly different from prayer recited as an invocation in meetings of adult legislative bodies and governing boards.[54]

A federal district court in Texas also held that recitation of an expressly Christian prayer adopted as a high school's official prayer at graduation ceremonies, athletic contests, and pep rallies violated the establishment clause.[55] Though attendance and prayer recitation at these events were voluntary, the principal or other school employees often initiated the prayer. The court held that the custom violated all three parts of the *Lemon* test. The purpose of the practice was religious; the sponsorship of the prayer and the close link between the prayer and the school program advanced religion as its primary effect by implying official school approval of religious activity; and the supervision and active participation by school officials in a religious practice on school property resulted in excessive entanglement of school officials in religious matters.

In *Bennett v. Livermore Unified School District*,[56] a California court declared that a public high school's tradition of including an invocation delivered by a member of the clergy or a student at voluntary graduation exercises violates the establishment clause. The school board did not provide guidelines for the content of the invocation, though a faculty adviser was assigned to help students chosen to give the invocation. The court ruled that the practice violates all three parts of the *Lemon* test: (a) the primary purpose of a religious invocation is religious, (b) it advances religion as its primary effect by endorsing both religion in general and the particular beliefs expressed in the invocation, and (c) nondenominational invocations would unduly entangle school officials in religious matters. The court also suggested that even a nondenominational prayer

53. Graham v. Central Community School Dist., 608 F. Supp. 531 (D. Iowa 1985).

54. Regarding prayer offered during meetings of a legislature or governing board, *see* Marsh v. Chambers, 463 U.S. 783 (1983), and Chapter 6, below.

55. Doe v. Aldine Indep. School Dist., 563 F. Supp. 883 (S.D. Tex. 1982).

56. 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (Cal. Ct. App. 1987).

would nevertheless be a prayer that would advance religion over both atheism and agnosticism.

As these conflicting cases demonstrate, the constitutionality of graduation prayer is a difficult issue. Analyzed under the *Lemon* test, such prayer appears to violate the establishment clause. Regardless of the secular, ceremonial nature of a graduation exercise as a whole, a prayer offered during the ceremony undeniably has the religious purpose of invoking divine blessing. By incorporating the expression of religious faith into an official school ceremony, the custom implies official school support of religious doctrine and thereby has the primary effect of advancing religion. Furthermore, any involvement by school officials in the prayer (e.g., selection of the speaker) would entail excessive governmental entanglement in religious affairs. Finally, as discussed earlier, the voluntary nature of participation in graduation and in recitation of a prayer does not save the custom from violating the establishment clause. Despite this analysis suggesting that graduation prayer is unconstitutional, the conflict among courts shows that the matter remains unsettled.

2. Baccalaureate Services. A traditional school ceremony related to graduation exercises is the baccalaureate service, which typically is conducted within a few days of commencement as a ceremony with plainly religious features, including prayer. Apparently no published court decisions have discussed the constitutionality of these services. It seems likely that a religious baccalaureate service can comply with the establishment and free exercise clauses by adhering to the following guidelines: (a) school officials should not participate in planning or conducting the service; (b) attendance must be voluntary; and (c) the service either must be held outside the school or, if held in a school building, must occur during nonschool hours or on a nonschool day. By following these guidelines, school authorities probably can avoid the establishment clause problem of implying official school endorsement of the religious activities and doctrines involved in the service and the free exercise problem of coercing students to engage in religious activities.[57]

3. Athletic Events. A situation similar to prayer during graduation is prayer during school athletic events—for example, as an invocation or during halftime at high school football games. In the spectrum between prohibited and permitted religious practices, such prayer seems to fall somewhere between graduation prayer and officially sanctioned prayer during the regular school day. Like graduation ceremonies, sporting events might seem separate from instruction and the school day; the events do not occur on a daily basis, attendance is voluntary, and parents and other adults not affiliated with the school

57. *See* Goodwin v. Cross County School Dist. No. 7, 394 F. Supp. 417, 427 (E.D. Ark. 1973).

often attend. However, considered under the three-part *Lemon* test, prayer at athletic events seems to have a religious purpose; it implies the school's approval of the prayer's religious message, and it entangles school officials with religion through planning and approval of the prayer. Also, although athletic contests do not occur daily, they occur more frequently than graduation ceremonies. Moreover, they can be regarded as related to instruction, since they teach student athletes important lessons about such values as team play, discipline, and sportsmanship. Consequently, prayer offered on such occasions is not just an isolated event but rather plays a larger role in shaping a school unit's official attitude toward religion. In the only published decision to consider this question,[58] a federal district court in Texas held that prayer on such occasions failed all three parts of the *Lemon* test and therefore violated the establishment clause.

D. Display of Religious Symbols

Just as the establishment clause prohibits officially school-sanctioned prayer as inappropriate public support for religious doctrine, so it prohibits the display of religious symbols in school to advance religious doctrine. The key question is whether particular religious symbols are displayed in a religious or secular manner.

In *Stone v. Graham*,[59] the United States Supreme Court struck down, under the establishment clause, a Kentucky statute that required the posting of the Ten Commandments in classrooms, explaining that the first four commandments (dealing with duties toward God) make the Ten Commandments a sacred text. The Court found that the statute had the purpose of inducing students to read, reflect on, and obey the Ten Commandments. It regarded as ineffective the following disclaimer required by the statute to appear on every copy of the Ten Commandments that was displayed in a classroom: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." The Court concluded that this disclaimer did not change the underlying context of the document's display as a religious admonition rather than as material appropriately integrated into the school curriculum.

Determining whether a particular symbol is "religious" or is displayed in a religious manner can be a vexing challenge for a school official. For example, in *Florey v. Sioux Falls School District 49-5*,[60] the United States Court of

58. Doe v. Aldine Indep. School Dist., 563 F. Supp. 883 (S.D. Tex. 1982). In a decision not published at this writing, a federal district court ruled that a forty-year-old tradition of prayers read over the loudspeaker before home football games violates the establishment clause. Jager v. Douglas County School Dist., No. C86-2037A, (N.D. Ga. Feb. 3, 1987).

59. 449 U.S. 39 (1981).

60. 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).

Appeals for the Eighth Circuit upheld a school board policy that permitted the use of religious symbols like crosses, menorahs, crescents, Stars of David, creches, and symbols of Native American religions—"provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature." The court explained its decision within the framework of the three-part test. First, it said that the policy's secular purpose was to enhance students' knowledge of their religious and cultural heritage rather than to promote religious doctrine. It noted that the Supreme Court had commented in *Schempp* that the establishment clause does not prohibit the study of religion "when presented objectively as part of a secular program of education."[61] Second, the court concluded that school personnel in fact carried out the policy to achieve the primary effect of improving students' appreciation of their heritage rather than to spread religious doctrine. Third, it determined that the policy minimized government entanglement with religion by providing administrators and teachers with guidelines for displaying religious symbols for secular purposes.

In *Lynch v. Donnelly*[62] the United States Supreme Court upheld the inclusion of a creche in an annual municipal Christmas display. This decision lends support to the analysis used by the Eighth Circuit in *Florey*. Although the Court acknowledged "the religious significance of the creche,"[63] it ruled that the city's practice of including a creche in its display complied with the establishment clause. The Court explained that the secular context of the creche—the celebration of the national holiday of Christmas—gave that display the secular purposes of "celebrat[ing] the Holiday and . . . depict[ing] the origins of that Holiday,"[64] and made any benefit to Christianity "indirect, remote, and incidental."[65]

In analyzing the dispute in *Lynch*, the Court commented briefly about the use of religious symbols in public schools. Citing its earlier opinion in *Stone v. Graham*, the Court stressed that the context in which such symbols are displayed determines whether their display complies with the establishment clause. As the Court explained in *Stone*, the central issue is whether such symbols are displayed with religious purpose or effect or used as components of secular instruction about religion in secular courses like history, literature, and comparative religion.[66] Through both its contents and its enforcement by school personnel, the policy challenged in *Florey* appears to have adhered to the

61. 374 U.S. 203, 225 (1963).
62. 465 U.S. 668 (1984).
63. *Id.* at 687.
64. *Id.* at 681.
65. *Id.* at 683.
66. 449 U.S. 39, 42 (1981).

Supreme Court's requirement of restricting the use of religious symbols to secular instruction about religion.

E. Holiday Observances

In *Florey* the Eighth Circuit Court of Appeals also addressed a question closely related to the constitutionality of displaying religious symbols in public schools: the constitutionality of a school district's policy permitting public schools to observe holidays "which have a religious and a secular basis," expressly including Christmas, Easter, Passover, Chanukah, St. Valentine's Day, St. Patrick's Day, Thanksgiving, and Halloween. Observances included the singing of Christmas carols. Using the same three-part analysis it used to assess the constitutionality of the display of religious symbols, the court upheld the challenged holiday-observance rules.[67] It contrasted the secular goal of the policy with an example of an unconstitutional application of that policy: a Christmas quiz for kindergarten classes in which correct answers required students to acknowledge Jesus as their saviour and to state that angels saluted his birth in song. In short, as with displaying religious symbols, an observance of religious holidays is constitutional if its purpose is to provide secular instruction about religious traditions, rather than to promote the religions involved.

Another issue regarding religious holidays is the right of students to stay home to observe them. The free speech clause generally guarantees this right. For example, a federal district court in Texas struck down a school board policy that limited the number of excused absences for religious reasons to two days, precluded credit for makeup work for unexcused absences, and required teachers to give students zero grades for tests or daily graded work missed during unexcused absences.[68] A church and students who were members of that church sued the board on behalf of those students, who sought to be excused from school for eight to ten days to observe holidays recognized by their faith. The court ruled that the board's reasons for adopting the policy—enforcing regular attendance and the need to apply a policy uniformly to all students of all faiths—were not sufficiently compelling to override the students' right to exercise their faith. To accommodate the free exercise right of students to observe religious holidays, school officials should work with students and parents to arrange for

67. The court sidestepped the question whether Christmas carols are religious as well as cultural in contemporary America. Instead, it focused on the educational context of carol singing in the schools, observing that even if carols are religious, the secular, cultural significance of carols justifies their inclusion in public school education. The court reasoned that when an activity serves a primarily secular purpose—such as contributing to secular instruction about American culture—the inclusion of religious content does not by itself make the activity unconstitutional.

68. Church of God v. Amarillo Indep. School Dist., 511 F. Supp. 613 (N.D. Tex. 1981), *aff'd per curiam*, 670 F.2d 46 (5th Cir. 1982).

students to make up work missed during religious holidays and should try to avoid scheduling examinations and other major events on religious holidays.

F. Bible Distribution

Until 1978 courts around the nation unanimously vetoed the common practice of allowing representatives of groups like the Gideons to distribute Bibles to schoolchildren, holding that distribution of Bibles plainly serves the religious purpose of spreading Biblical doctrine to students, conveys the appearance of official support for these doctrines, and uses school facilities as the vehicle for distributing a religious text.[69] This unanimity was broken in *Meltzer v. Board of Public Instruction of Orange County*.[70] In that case a school district had tinkered with its previously rejected policy in such a way as to allow the local Gideons simply to leave Bibles on a table for students to take if they wished. The United States Court of Appeals for the Fifth Circuit upheld the new policy without explanation in an equally divided decision. Thorough scrutiny under the three-part test would suggest that the policy sustained in *Meltzer* fails all three parts: it serves a religious purpose of facilitating the dissemination of religious doctrine; it might appear to put the official stamp of approval on that doctrine; and it permits the use of school facilities to spread that doctrine. Nevertheless, the *Meltzer* decision shows that at least one court has tolerated the "passive" approach to Bible distribution. Before relying on that decision to authorize this method of Bible distribution, school officials should consider the legal consequences of such a practice. By opening up a public school as a site for Bible distribution by an outside organization, school officials would thereby create a forum for distribution of literature by virtually all outside groups. Officials could not lawfully open school doors to the Bible while closing them to other—perhaps more controversial—kinds of literature.

G. Conclusion

The Supreme Court's early opinions about devotional activities in public school in *Engel* and *Schempp* initially appeared clear and decisive. Regardless of public opinion about the wisdom of those decisions, at least they seemed to establish comprehensible guidelines about the question of school prayer. However, inconsistencies have developed in judicial review of other school religious activities since those decisions. Courts in some cases strictly scrutinize

69. Tudor v. Board of Educ., 41 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954); Goodwin v. Cross County School Dist. No. 7, 394 F. Supp. 417 (E.D. Ark. 1973); Brown v. Orange County Bd. of Pub. Instruction, 128 So. 2d 181 (Fla. Ct. App. 1960). *See also* Hernandez v. Hanson, 430 F. Supp. 1154 (D. Neb. 1977).

70. 577 F.2d 311 (5th Cir. 1978) (*en banc*) (*per curiam*), *cert. denied*, 439 U.S. 1089 (1979).

practices in order to enforce the establishment clause vigorously. In other cases courts seem willing to permit considerable government accommodation of religious activity. The three-part test is helpful, but judicial manipulation of the test occasionally undermines its value.

Beyond the three-part test, a few analytic themes emerge from the cases discussed in this article. First, courts examine the purpose and implementation of activities. They sometimes have given passing constitutional grades to activities with religious content when they were instituted and executed in genuinely secular contexts (e.g., activities designed for historical, literary, or cultural instruction). They also address whether practices are religious or have been deemed by judicial fiat to be sapped of their religious significance, transformed into traditional secular customs (e.g., graduation prayer and holiday observances). In addition, courts focus on the relation of religious activities to the regular school routine. Activities connected to the regular school day generally have failed constitutional challenge (e.g., school prayer), while practices independent of the normal school day often have survived challenges (e.g., graduation prayer and prayer gatherings with no relation to the official curricular or extracurricular program). Finally, although the Supreme Court has plainly ruled that voluntariness is not relevant to whether a practice violates the establishment clause, some courts that have upheld graduation prayer nonetheless have cited the voluntary nature of such prayer as significant factors in their decisions under the establishment clause.

Chapter 3

RELIGIOUS OBJECTIONS TO SECULAR, NONCURRICULAR STUDENT ACTIVITIES

Sometimes students object on religious grounds to secular school activities. Thus far, they have done so under the free exercise clause, contending that participating in particular activities—like reciting the pledge of allegiance—would conflict with their religious beliefs. In these cases, courts have used the free exercise analysis discussed earlier to weigh the school's interest in the activities against the student's interest in practicing his faith, to consider whether the school could offer the student reasonably available alternative activities, and to consider whether the student has a right to be excused from the challenged activity. For example, in *West Virginia Board of Education v. Barnette*,[71] the United States Supreme Court ruled that a student whose Jehovah's Witness faith prohibited saluting the flag had a free exercise right to be excused from the flag salute.[72] In *Florey*, discussed above with respect to observance of religious holidays, the Eighth Circuit stated that a student who objects on religious grounds to a school's secular observance of a religious holiday has a free exercise right to be excused from participating in it.

71. 319 U.S. 624 (1943).

72. After *Barnette*, other courts ruled that the free speech clause of the First Amendment secures to students the right not to stand during the flag salute. *See* Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973).

Chapter 4

RELIGION AND THE CURRICULUM

In considering religion and the public schools, a core question is the role of religion in instruction and instructional materials for school curriculums. Controversy over religion in the curriculum reflects an underlying tension between two basic school law principles. First, the law vests school officials with control over curriculum, including—the United States Supreme Court says—material designed to promote community values.[73] But second, in order to protect the rights of individual students and parents, the First Amendment limits officials' authority over curriculum.[74]

This section will study the limits imposed by the First Amendment on the role of religion in the public school curriculum by examining the application of First Amendment principles to the three situations in which the issue typically arises: (1) courses about religion or religious segments of otherwise secular courses; (2) opposition from some elements of the religious community to instruction about certain topics—specifically, evolution and sex education—in the secular curriculum; and (3) religious objections to the use of secular instructional materials or methods.

A. Courses or Course Segments About Religion

The primary forms in which religion appears in the curriculum are courses about religion (such as Bible study and comparative religion) and secular courses (such as history or literature) that contain units about religious topics. The Supreme Court set the framework for constitutional analysis of instruction about religion in public schools in *Illinois* ex rel. *McCollum v. Board of Education*[75] and *School District of Abington Township v. Schempp*.[76] In *McCollum* the Court ruled that a program of religious instruction in the public schools of Champaign, Illinois, violated the establishment clause. Under the program, a local interfaith religious council hired teachers (usually members of the clergy) to

73. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982); Ambach v. Norwick, 441 U.S. 68, 76 (1979); Epperson v. Arkansas, 393 U.S. 97, 107 (1968).
74. *Id.*; West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
75. 333 U.S. 203 (1948).
76. 374 U.S. 203 (1963).

give weekly religious instruction to public school students for thirty minutes during the school day in regular classrooms. Protestant, Catholic, and Jewish students were taught separately by teachers of their own faiths. This instruction was given at no cost to the school district but was subject to the superintendent's approval and supervision. The program included an excusal policy: students who chose not to receive religious instruction had to leave their classrooms to pursue secular studies elsewhere in the building. The Court held that this program violated the establishment clause because it employed both the force of the state's compulsory education law and public buildings to aid religious groups by providing pupils and facilities to disseminate religious beliefs[77] (in a later case[78] the Court held that a released-time program that permitted public school students to leave school during regular hours for private, off-campus religious training did not violate the establishment clause).

The Supreme Court refined the holding of *McCollum* in *Schempp*, declaring that the establishment clause forbids sectarian, indoctrinating instruction about religion in public schools but permits instruction concerning religion in a secular, objective, nonindoctrinating manner. The Court stated,

> [I]t might well be said that one's education is not complete without a study of comparative religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[79]

McCollum and *Schempp*, then, establish the ground rules for courses about religion. The establishment clause permits neutral, secular instruction *about* religion but forbids sectarian, indoctrinating teaching *of* religion.

Lower courts have applied that analysis in several cases. Those decisions show that courts will permit courses about religion, but only if certain criteria of form and content are satisfied to keep instruction secular rather than sectarian. The most illuminating judicial review of religion courses came in a series of three decisions by a federal district court in *Wiley v. Franklin*.[80] In those cases, in addressing challenges by parents and students, the court thoroughly probed the form and content of Bible study courses in public elementary schools in Chattanooga and Hamilton County, Tennessee. The *Wiley* trilogy offers a helpful lesson in the constitutional principles governing religion courses.

77. McCollum, 333 U.S. 203 (1948).
78. Zorach v. Clauson, 343 U.S. 306 (1952).
79. 374 U.S. 203, 225 (1963).
80. 468 F. Supp. 133 (E.D. Tenn. 1979) (Wiley I); 474 F. Supp. 525 (E.D. Tenn. 1980) (Wiley II); 497 F. Supp. 390 (E.D. Tenn. 1980) (Wiley III).

In the first *Wiley* decision, the court ruled that the courses—similar to the program struck down in *McCollum*—violated the establishment clause. They had been sponsored since 1922 by a voluntary citizens' group called the Public School Bible Study Committee. Committee membership consisted principally of members of evangelical Protestant churches. Local churches donated money to the committee, and local clergy and lay church leaders played active parts in managing the committee. The committee raised funds for and paid Bible teachers' salaries and also hired, trained, and assigned teachers.

The only fixed standard for selection as a teacher was a record of previous Bible study; certification was not required. Although the committee denied that it required teachers to espouse religious faith, the committee director asked applicants whether they had a "love of God." Local school officials retained authority to supervise and remove teachers.

Classes were taught at each grade level for thirty minutes every week in classrooms other than the students' regular classroom. The courses were given as electives; students were enrolled only with written parental consent. To avoid singling out students who did not elect to take the courses, only half of the students who chose to do so could enroll in a given semester, thereby ensuring that students who did not take the course stayed with the other half of their classmates in a regular classroom.

The Bible Study Committee prepared the curriculum, subject to approval by school officials. The stated objectives of the program were to acquaint students with major Bible characters and stories; with the Bible's contributions to history, literature, art, and music; and with the Bible's role in shaping cultural values. Sample lesson titles included:

> *First Grade:* The Bible: How It Came to Be; The Creation: Part I; The Creation: Part II; Noah; Abraham: Journeys to Canaan; Abraham: Journey into Egypt; Jesus and the Ten Lepers and/or Jesus and the Paralytic; The Feeding of 5,000; Family Relationships.
>
> *Fourth Grade:* The Bible: Archaeology, Geography, etc.; Deborah and Barak; Gideon; Saul Becomes King; Saul and the Amalekites; David Anointed King; David and Goliath; The Crucifixion; The Resurrection; Commitment to One's Beliefs.

As for teaching methods, teachers described their goal as letting the Bible "speak for itself." They stressed Biblical storytelling as "the hallmark of classroom instruction," avoiding mere recitation of Bible passages, personal avowals of faith, comments about the beliefs of others, and Biblical interpretation or criticism. Although the Bible Study Committee did not mandate the use of a particular version of the Bible, teachers generally used the King James version of the Old and New Testaments.

The court focused on the form of the program in striking it down under the establishment clause. Applying the three-part test, the court concluded that (1) the committee's control over the curriculum and selection, training, payment, assignment, and supervision of teachers showed that the program had a religious purpose of promoting Christian beliefs; (2) it advanced Christianity over other faiths; and (3) it unduly entangled school officials in the committee's work. In addition, the committee director's inquiry of teacher applicants whether they loved God violated the Supreme Court's prohibition in an earlier case[81] of tests of faith as a condition of public employment.

The court further concluded that the program's content also violated the establishment clause in two ways. First, some lesson titles appeared to stress religious themes over secular instruction. Second, the philosophy of letting the Bible "speak for itself," without selecting or interpreting passages for secular educational reasons, actually promoted the fundamentalist approach of reading the Bible literally.

In contrast to its ruling in regard to the establishment clause, the court found that the program complied with the free exercise clause. It decided that the facts that (a) the program was elective and required parents' written consent and (b) only half the children were allowed to take the course at any one time adequately protected children from being or feeling coerced into taking the courses.

To correct the constitutional flaws in the program's form, the court ordered school officials to establish uniform standards for hiring teachers; to exclude profession of religious faith as a condition of employment; and to vest school officials with exclusive control over the hiring, training, assignment, and supervision of teachers and curriculum. The court declared that the establishment clause did not bar school officials from accepting funds for the program from the Bible Study Committee or other private sources. To remedy constitutional deficiencies in the program's content, the court directed school officials to revise the curriculum,

> to eliminate all lesson titles whose only reasonable interpretation and message is a religious message and which lessons are not reasonably capable of being taught within the confines of a secular course in history, literature or other secular subject matter normally included within or recognized as suitable for an elementary school curriculum.[82]

After *Wiley I*, school officials redesigned the Bible study program within the court's guidelines. The court reviewed their efforts in *Wiley II*. With respect to teacher qualifications, the court approved their proposal to establish qualifi-

81. Torcaso v. Watkins, 367 U.S. 488 (1961).
82. 468 F. Supp. at 152.

cations as to college degree, elementary school certification, and training in Bible literature while rejecting a proposal to authorize the hiring of some teachers with inferior qualifications (for example, teachers who had no college degree and were not certified to teach elementary school). The court approved school officials' assumption of exclusive control over the hiring, training, assignment, and supervision of teachers; it also suggested that a teacher-training program include instruction to teachers about the free exercise and establishment clauses.

Turning to the revised curriculum, the court studied the proposed new lesson titles. For example, the sample first- and fourth-grade lesson plans quoted above were changed as follows:

> *First Grade:* The Bible: From Scrolls to Printed Page; Narratives of the Beginning: Earth, Sun, Moon, Stars, Animals, and Man; Adam and Eve in the Garden of Eden; Abraham; Lot, Sodom, and Gomorrah; Belshazzar's Feast; Jesus and the Ten Lepers/Jesus and the Paralytic; Jesus and the Gerasene Swine; The Prodigal Son.
>
> *Fourth Grade:* The Bible: Influence on Sciences; Deborah and Barak; Gideon; David the Musician; David and Jonathan; David As King; Jesus Crucified Between Two Thieves; Reports of the Resurrected Jesus; The Stoning of Stephen.

The court concluded that each lesson could be taught for its secular value, without religious emphasis, except for the fourth-grade lesson entitled "Reports of the Resurrected Jesus." That lesson, the court ruled, would necessarily deal in a religious way with "the central statement of the Christian religious faith"[83] and could not be taught in a secular manner.[84] With respect to teaching methods, the court directed officials to ensure that classes avoid endorsement or criticism of specific beliefs and instead deal only with the objective, nonindoctrinating study of the Bible's relation to history, literature, art, music, and social customs.

In *Wiley III*, the court probed yet further into the content of the curriculum, reviewing tapes of six actual classes. Three lessons covered the stories and historical significance of the battle of Jericho, the establishment of the kingdom of Israel under Saul, and the meaning of "parable" by reference to the New Testament parable of the talents and one of Aesop's fables. Three other lessons dealt with God's punishing the Babylonian King Belshazzar; God's threatening to destroy the Israelites for their worship of the golden calf; and stories of Abra-

83. 474 F. Supp. at 531.

84. Although instruction about New Testament reports of Jesus' resurrection plainly creates a risk of indoctrination, it would appear that the court was unduly pessimistic about whether students could be taught about the resurrection story and its role in Christianity and western culture—or, for that matter, about any alleged religious miracle—without either endorsing or criticizing its factual truth.

ham, including God's promise to Abraham and his descendants of perpetual dominion over Canaan and the destruction of Sodom and Gomorrah for their wickedness.

The court found that the first three lessons were properly confined to non-devotional instruction in Biblical history and literature, given with secular intent and neither advancing nor inhibiting religion as their primary effect. Thus the first three lessons hewed closely to the principles of secular instruction about religion set forth in *Schempp*, in compliance with the establishment clause. In contrast, the court found, the other three lessons improperly were intended to convey religious messages rather than literary or historical messages and their primary effect was to promote religious doctrine rather than to convey Biblical history or literature in a secular fashion. They ran afoul of the establishment clause by divorcing religion from any secular context and treating Bible stories of divine miracles as factual, historical accounts.

While the *Wiley* trilogy represents the most intensive judicial review of public school religion courses, other courts also have addressed the issue. Comparisons among these cases can enhance school officials' grasp of the constitutional principles to govern the courses. The United States Court of Appeals for the Fifth Circuit addressed a parent's challenge to an elective Bible literature course in a public high school in Conecuh County, Alabama.[85] The court observed that the textbook for the course followed a fundamentalist Christian approach to Bible study without any discussion of the Bible's secular value. It also noted that the teacher, an ordained Baptist minister and a qualified literature teacher, gave examinations that stressed rote memorizing of the Bible. In view of these problems, the court found that the course failed the second part of the three-part establishment clause test in that the promotion of fundamentalist Christian beliefs would be its primary effect.

In *Vaughn v. Reed*,[86] a federal district court considered a challenge to a program of religious instruction conducted in certain public elementary schools in Martinsville, Virginia, since 1942. The program's form resembled the structure of the program struck down in *Wiley I*—a private religious group hired and paid instructors to teach religion to third, fourth, and fifth graders in regular classroooms each week for one hour during the school day. The program had an excusal procedure that permitted students who did not wish to take such instruction to attend study hall.

Following the *McCollum* decision, the court held that the program violated the establishment clause because of the private group's control over the hiring, payment, and supervision of teachers and the use of public facilities for religious indoctrination. Whereas the court in *Wiley I* approved the excusal policy

85. Hall v. Board of School Comm'rs, 656 F.2d 999 (5th Cir. 1981).
86. 313 F. Supp. 431 (W.D. Va. 1970).

in that case, the court in *Vaughn* found that the excusal policy itself was evidence that the course was given as religious indoctrination. It did not review the content of the course, merely directing school officials to follow the guidelines of *Schempp* by avoiding promotion of sectarian beliefs.

In *Crockett v. Sorenson*,[87] a Bible study program offered to fourth and fifth graders in Bristol, Virginia, foundered on the establishment clause. A group of local Protestant ministers hired, paid, and supervised teachers and designed the curriculum. School officials exercised no control over the classes except to monitor attendance. Students attended the classes for forty-five minutes each week, receiving no grades or credit. An excusal policy permitted children who chose not to attend the classes to go to study hall or a physical education class. Until 1982 the curriculum called for Bible teaching, prayer, and hymn singing; then prayers and hymns were deleted, leaving a program of Bible instruction and nondevotional music.

As the court had done in *Wiley III*, the federal district court in *Crockett* viewed videotapes of the classes and concluded that the lessons were presented objectively in a manner appropriate for the grade levels, without any efforts to indoctrinate students in the tenets of a particular faith. Echoing the position of the Supreme Court in *Schempp*, the *Crockett* court noted the importance of a grasp of the Bible in studying art, music, literature, and culture—from appreciating the *Last Supper* and the *Messiah* to reading *Moby-Dick* and understanding the Biblical sources of common terms in our culture. However, the court found that the control exercised by the ministers had made the courses a state-sponsored religious program that violated the establishment clause. Parting ways with the *Vaughn* court and joining with the *Wiley I* court, the *Crockett* court endorsed the elective nature of the program. It observed that even if the course were to shed all trappings of religious education and become fully secular in form and content, requiring a student whose faith forbids even the neutral study of religion to participate in the classes would violate his right to free exercise of his faith.

The court counseled school officials to redesign the program along the following lines. (1) School officials should exercise exclusive control over the program, including personnel matters, curriculum, and textbooks. (2) Officials should hire only certified teachers and should not require profession of religious faith as a condition of employment. (3) Teachers must teach objectively, without seeking to indoctrinate students. (4) The course should continue as an elective, but students should be offered legitimate academic classes as alternatives. (5) Officials may accept contributions to the program from private sources, if the funds come with no conditions regarding the form or content of the program.

87. 568 F. Supp. 1422 (W.D. Va. 1983).

School officials can draw important lessons from these cases. With respect to content, the establishment clause permits instruction about religion for secular educational purposes, even though materials that convey religious messages may be used in the instruction. The *Wiley* cases demonstrate the difficulty of designing a curriculum that will comply with the establishment clause—and the lengths to which courts may go to scrutinize a curriculum. Consider the teaching of Greek mythology as a useful analogy. A teacher in a modern American school could instruct students about Greek myths from the perspectives of literature, art, history, and comparative religion without endorsing or criticizing the religious beliefs or views of history expressed by the myths. A public school religion teacher should instruct about the Bible or modern Western religions in the same way.

The same principles govern instruction about pertinent religious issues as units of secular courses, such as history, art, music, or literature. For example, religion plainly would be relevant to a course about colonial American history. However, such instruction must pertain directly to a secular purpose. The study of the role of religion in colonial America does not open the door to instruction about unrelated religious topics or to religious indoctrination.

With respect to form, courts consistently have struck down programs controlled by private groups in terms of hiring, training, supervising, and assigning teachers and selecting curriculum and textbooks. Courts also prohibit profession of faith as a prerequisite for teachers' employment.

Two issues of form remain unsettled: the elective nature of religion courses and the propriety of private funding of such courses. The *Wiley*, *Crockett*, and *Vaughn* decisions show that courts have differed on whether the courses should be offered as electives or, if at all, as required courses. The *Wiley* and *Crockett* holdings, which insist that such courses be elective, appear most faithful to the dictates of the free exercise clause. As the *Crockett* court observed, the free exercise clause protects people from compulsory participation in secular as well as religious activities that impair their exercise of religious faith—for example, flag salutes and military conscription. In the same vein, even if a religion course is conducted as a neutral, secular activity, the free exercise clause should shield a child whose faith opposes such treatment of religion from required attendance of the course.[88]

88. While a policy of excusal from religion courses may be constitutionally required in order to protect the free exercise rights of some students, it is important to consider the potentially limited scope of a student's right to excusal from public school activities. There might well be circumstances in which excusal would excessively interfere with a student's education. Exemption from a course peripheral to public school instruction, such as Bible study, would not significantly interfere with a student's education. *See, e.g.*, Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972) (granting exemption from public school ROTC course on religious grounds). However, exemption from an entire course or substantial segments of a course more central to the educational purpose of public schools, such as science or history, could jeopardize the quality of a student's education. In such

As to funding, the courts in *Wiley* and *Crockett* ruled that the establishment clause does not bar private funding of religion courses. The *Crockett* court cautioned that such funding may be accepted only with "no strings" attached regarding the form or content of the courses. Despite these judicial blessings of private funding, school officials should consider that such funding might create the appearance of doctrinal support by religious groups. School units that choose to accept private donations for religion courses should heed the warning in *Crockett* and adopt policies that insulate the courses from any influence by donors.

B. Religious Objections to Secular Courses

1. Evolution and Creationism. Controversies over religious objections to secular courses generally have focused on two topics—evolution and sex education. The conflict over instruction about the Darwinian and Biblical accounts of the origin of human beings has taken several forms: efforts to prohibit the teaching of evolution, measures to require teachers or textbooks that discuss evolution to give "equal treatment" to the Biblical account, and attempts to require teachers who instruct about evolution to disclaim it as "mere" theory rather than scientific fact. Analysis of these disputes calls for a grasp of the dynamic relationship between the establishment and free exercise clauses.

Efforts to prohibit the teaching of evolution captured nationwide attention in 1927 through the "monkey trial"—*Scopes v. State*.[89] In that case a teacher was convicted at trial of violating a Tennessee statute by teaching about evolution. His conviction was reversed on appeal by the Tennessee Supreme Court because of a technicality, but the court upheld the law's constitutionality. Not until 1968, in *Epperson v. Arkansas*,[90] did the United States Supreme Court finally and decisively address the constitutionality of statutes that prohibit teaching about evolution. In *Epperson* the Court held that an Arkansas statute that prohibited instruction about evolution in public schools violated the establishment clause because it imprinted a government stamp of fundamentalist doctrine on public school education, thereby promoting such doctrine. As the Court observed,

> The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine;

---

instances a court might rule that the state's interest in educating a child outweighs the burden on the child's religious beliefs. At that point a parent's only remedy would be to enroll the child in a private school with a curriculum more in harmony with the family's faith or to provide home instruction. For a full discussion of this issue concerning objections to secular materials or methods of instruction, *see* Chapter 4, Section C.

89. 154 Tenn. 105, 289 S.W. 363 (1927).

90. 393 U.S. 97 (1968).

that is, with a particular interpretation of the Book of Genesis by a particular religious group.[91]

The Court then explained, "There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[92]

In *Wright v. Houston Independent School District*,[93] a group of parents and students sought to prohibit the teaching of evolution through a court injunction rather than by statute. However, the federal district court ruled that *Epperson* bars a court, as well as a legislature, from prohibiting instruction about evolution. To avoid the force of *Epperson*, the plaintiffs put a novel twist on the debate, arguing that teaching the theory of evolution establishes a religion of "secular humanism," in violation of the establishment and free exercise clauses. Their view—that the neutral, value-free treatment of religiously sensitive issues in secular courses is a basic tenet of an atheistic, relativistic faith that they called "secular humanism"—is a keystone of contemporary religious challenges to secular education.

The court rejected the plaintiffs' argument. Analyzing their contention under the three-part establishment clause test, it ruled that teaching about evolution does not serve a religious purpose, promote religious beliefs, or unduly entangle government in religion. It further explained, "Science and religion necessarily deal with many of the same questions, and they may frequently provide conflicting answers. . . . Teachers of science in the public schools should not be expected to avoid the discussion of every scientific issue on which some religion claims expertise."[94] The court also rejected the plaintiffs' alternative proposal for an injunction directing teachers who instruct about evolution to give equal time to the Biblical account of creation. Commenting that a court is not qualified to strike a balance among the many views of human origins held by various faiths, it termed the proposal an "impractical, unworkable and ineffective" remedy.

Finally, the court disagreed with the plaintiffs' position that instruction about evolution violates the free exercise rights of students whose religious faith endorses creationism. The free exercise rights of such students, the court ruled, can be protected adequately by an excusal policy that exempts them from instruction about evolution.

While the *Wright* court rejected a balanced-treatment proposal as impractical, a federal district court in *McLean v. Arkansas Board of Education*[95] exam-

91. *Id.* at 103.
92. *Id.* at 106.
93. 366 F. Supp. 1208 (S.D. Tex. 1972).
94. *Id.* at 1211.
95. 529 F. Supp. 1255 (E.D. Ark. 1982).

ined the idea more deeply to find theoretical flaws in a statute that mandated balanced treatment of evolution and "creation-science." Scientific creationism, the court explained, was first promoted by fundamentalist groups in the 1960s; that school of thought is based on the view that scientific evidence supports the Biblical view of the creation of the universe and the origin of man. Assessing the statute under the three-part establishment clause test, the court first found that the law had the impermissible purpose of endorsing religious doctrine. In reaching this conclusion, the court examined the religious motivation of the law's sponsors. It also studied the statute's content, concluding that scientific creationism is a theory designed to support the Biblical account of creation and the origin of man, even though its proponents often avoid express reference to God or the Bible.

The court also found that by requiring instruction about religious doctrines, the statute advanced religion. The court examined evidence that is said to support the scientific status of scientific creationism; it determined that creation science, as defined by the statute, is not a genuine scientific theory—and therefore lacks secular educational value—because its principles fail to satisfy the basic criteria of scientific theory: (1) guidance by natural law; (2) reference to natural law to explain phenomena; and (3) offering of tentative hypotheses subject to empirical verification. Since instruction in creation science would advance religious doctrine without serving secular educational goals, the court ruled that it would fail the second prong of the establishment clause test in that advancement of religion would be its primary effect. In accord with the *Wright* decision, the court ruled that the theory of evolution is a scientific theory rather than a religious doctrine and, therefore, instruction about evolution does not violate the establishment clause.

Finally, the *McLean* court held that the Arkansas statute failed the third part of the establishment clause test by unduly entangling school officials in religion. Such entanglement would stem from the impossibility of designing a balanced-treatment curriculum while avoiding reference to religion.

More recently, the United States Supreme Court struck down a Louisiana balanced-treatment statute in *Edwards v. Aguillard*.[96] The avowed purpose of the statute was to protect academic freedom. It required a conditional type of balanced treatment: teachers need not instruct students about human origins, but if they teach either evolution or creation science, they must also teach the other theory. The law also required that both explanations of human origins be taught as theories rather than as proven scientific facts.

The Supreme Court found that several aspects of the history and contents of the statute demonstrated that it failed the first prong of the *Lemon* test because it lacked a clearly secular purpose. First, the Court studied the long his-

96. 107 S. Ct. 2573 (1987).

tory of the debate over public school instruction about human origins and the legislative history of the Louisiana law and concluded that the statute was another effort by adherents of creationism to promote their own beliefs and to oppose the theory of evolution because it conflicts with their beliefs. Second, the Court found that creation science, as contemplated by the statute, is a religious doctrine. In reaching this conclusion, the Court did not adopt the *McLean* court's approach of scrutinizing the legitimacy of creation science as a scientific theory. Rather, it examined the definition of creation science given by the statute's supporters and determined that the theory includes the religious belief that a supernatural being created the human species. The Court then ruled that since creation science, as defined by the Louisiana legislature, is a religious doctrine, the establishment clause forbids a state to promote it, whether by prohibiting any public school instruction about evolution (as did the statutes involved in *Scopes* and *Epperson*) or by conditioning instruction about evolution on a balanced treatment of creation science.

Another strategy for opposing the teaching of evolution has been to require teachers and textbooks to qualify evolution as mere theory rather than as proven fact. The United States Court of Appeals for the Sixth Circuit addressed the constitutionality of a Tennessee statute that required biology textbooks to give equal treatment to evolution and the Biblical account of creation and the origin of man and expressly to label the concept of evolution as mere theory.[97] Significantly, the statute exempted the creation story in the Book of Genesis from such a disclaimer. The court ruled that the combined effect of the equal-treatment and disclaimer requirements violated the establishment clause by giving the Biblical version a preferential position over scientific theories of human origin.[98]

As these decisions show, the case law governing the controversy over evolution and creationism in the public school curriculum exhibits striking consistency. Beginning with *Epperson*, courts uniformly have rejected attempts to exclude the theory of evolution from the curriculum or to dilute it. They have regarded such efforts as intrusions into the curriculum that are prompted by religious motives, in violation of the establishment clause.

While *Epperson* and *Aguillard* together ban legislatures and school boards from either mandating instruction about creation science or prohibiting instruction about evolution, a teacher probably has some degree of academic freedom in teaching about human origins: he or she could discuss problems in the theory of evolution from a secular, scientific perspective and probably could

97. Daniels v. Waters, 515 F.2d 485 (6th Cir. 1975).

98. The court also ruled that the establishment clause barred a provision of the statute that excluded "occult" or "Satanical" beliefs from religious beliefs entitled to balanced treatment and left the Genesis account of creation potentially as the sole religious account so entitled. Such distinctions among religious views, the court ruled, would cause excessive government entanglement with religion.

discuss creationism objectively as a view of human origins in which some people believe and historically have believed.[99] However, *Aguillard* might prohibit a teacher—as an agent of the state—from presenting creationism (or creation science) on a par with the theory of evolution as a plausible scientific account of human origins.

A key feature of these cases is the firm distinction drawn between scientific theory and religious doctrine, a distinction that merits further discussion. As noted above, opponents of instruction about evolution often charge that the theory of evolution is a tenet of an atheistic faith of secular humanism. At first glance, this view appears to gain support from the Supreme Court's comment in *Schempp* that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion and thus preferring those who believe in no religion over those who do believe."[100] However, the Court's statement prohibits only indoctrination about atheism through public instruction; it does not bar teaching of secular theories merely because they conflict with particular religious doctrines. As the Supreme Court stated in *Epperson*, five years after *Schempp*, the First Amendment "forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma."[101] In short, the fact of conflict between secular and religious views on the same issue does not by itself transform the secular theory into religious doctrine.[102]

Although the establishment clause shields instruction about evolution from religious opposition, the free exercise clause should alert school officials to the serious, genuine concerns of some parents and students who believe that exposure to such instruction would undermine the students' religious faith. As

99. But academic freedom would not entitle a teacher to refuse for religious reasons to teach about evolution in defiance of a curriculum adopted by his superiors. *See* Palmer v. Board of Educ., 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

100. 374 U.S. 203, 225 (1963).

101. 393 U.S. 97, 106-7 (1968).

102. *See also* Crowley v. Smithsonian Inst., 636 F.2d 738 (D.C. Cir. 1980). A number of decisions that define "religion" under the First Amendment support this view. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 165-66, 176 (1965) (religion means a "sincere and meaningful [belief that] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God," a belief "based upon a power or a being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent"); Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (*per curiam*) (Adams, J., concurring) (religion generally entails belief in ultimate truths about comprehensive issues in life, along with practice of symbolic rituals). Note that in *Seeger*, the Supreme Court ruled that religion, within the meaning of the First Amendment, can include an atheistic faith that plays a role in a person's life equivalent to the role served by theistic faith.

Significantly, such definitions of religion do not include science, an enterprise with the purpose of understanding patterns among observable phenomena by reference to natural principles. Of course, a teacher conceivably could use the theory of evolution (or other secular theories) in an improper way to advance atheism and criticize major theistic religions by citing the theory of evolution as an example of a secular theory superior to Biblical views. Such a use of evolution as a weapon in the conflict between atheism and theism would violate the prohibition suggested in *Schempp* against the establishment of secular humanism as a religion.

noted in *Crockett*, the secular nature of a topic does not insulate it from conflicts with students' free exercise rights. The appropriate remedy for students who do not wish to learn about evolution because of their religious beliefs, as the court suggested in *Wright*, is an excusal policy that exempts those students from classes that teach about evolution.

2. Sex Education. Litigation concerning sex education courses generally has taken the form of lawsuits in which parents, students, or taxpayers seek court injunctions against the courses. The results follow the pattern of the evolution cases: courts have held that the establishment clause protects the courses from such opposition and that excusal policies adequately protect the free exercise rights of students who oppose the courses for religious reasons.[103]

Citizens for Parental Rights v. San Mateo County Board of Education[104] is a representative and instructive case. A group of parents brought suit to enjoin the implementation of family life and sex education programs by five local school districts. The programs had excusal policies that exempted students who opposed the courses. The plaintiffs challenged the program on several grounds, including the free exercise and establishment clauses.

The court held in favor of the school districts. In response to the plaintiffs' contention that the courses violate their children's free exercise rights by coercing them to learn about sexual matters in ways that conflict with their religious beliefs, the court stated that the establishment clause, as interpreted in *Epperson*, prohibits school officials from tailoring instruction to anyone's particular religious doctrine. To enjoin sex education, as the plaintiffs' requested, would enshrine the plaintiffs' faith as law by using the court to ensure that public school curriculum conforms to their beliefs. The court concluded that an excusal policy would adequately protect the free exercise rights of parents and students who oppose sex education for religious reasons.

The court also rejected an establishment clause argument analogous to the contentions about evolution that were rejected in *Wright* and *McLean*: that the sex education program would establish secular humanist religious beliefs concerning morality, family life, and reproduction that are hostile to the plaintiffs' religious beliefs. In response, the court observed that the sex education curriculum treats these topics neutrally, from the viewpoint of public health, without advocating any opinions about them. In fact, the curriculum directs teachers to refer students to their parents and clergy for specific advice and instruction. The court explained that the mere clash between secular sex education and

---

103. Smith v. Ricci, 89 N.J. 514, 446 A.2d 501 (1982); Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975), *appeal dismissed*, 425 U.S. 908 (1976); Medeiros v. Kiyosaki, 52 Hawaii 436, 478 P.2d 314 (1970); Cornwell v. State Bd. of Educ. 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970).

104. 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975), *appeal dismissed*, 425 U.S. 908 (1976).

the plaintiffs' religious beliefs does not convert the secular program into a state-supported religious doctrine in violation of the establishment clause.

C. Religious Objections to Secular Instructional Materials and Methods

In some cases parents and taxpayers have objected for religious reasons to the use of secular instructional materials or methods rather than to the subject matter of courses. Most of these cases have involved objections made under the free exercise clause. Courts have generally applied to these cases the same analysis they have adopted for considering religious objections to secular courses: the use of secular materials or methods that conflict with beliefs of a particular religious faith does not violate the establishment clause, but the free exercise clause may give a student the right to be excused from using the material or method in question.

A review of suits brought under the free exercise clause shows that students around the nation have raised religious objections to a variety of instructional materials and methods, including the use of certain texts or other books,[105] the use of instructional movies,[106] the wearing of particular clothing in physical education classes,[107] and coeducational dancing in physical education class.[108] The central issue in such cases is the scope of a student's excusal right. Since the free exercise clause requires both a balancing of the government's interest in a particular policy or practice against the student's religious faith and a determination of whether the government could fulfill its interests through alternative policies that impose less of a burden on a person's faith, each case must be considered individually. Nevertheless, an examination of case law on this issue reveals some general principles that school officials can follow in order to comply with the free exercise clause.

First, school officials should try to avoid unnecessary conflicts between the school's educational interests and the student's free exercise right by considering whether an alternative material or method that could achieve the same educational goal is reasonably available. For example, in *Grove v. Mead School District No. 354*,[109] a teacher followed this approach by permitting the objecting student to read a different book from the one challenged. In a case in which a student objected on religious grounds to having to wear a particular uniform

105. Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir.), *cert. denied*, 106 S. Ct. 85 (1985); Mozert v. Hawkins County Pub. Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988).

106. Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974).

107. Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979); Mitchell v. McCall, 273 Ala. 604, 143 So. 2d 629 (1962).

108. Hardwick v. Board of School Trustees, 54 Cal. App. 696, 205 P. 49 (Cal. Ct. App. 1921).

109. 753 F.2d 1528 (9th Cir.), *cert. denied*, 106 S. Ct. 85 (1985).

in physical education class, the Alabama Supreme Court ruled that school officials honored the student's free exercise right by permitting her to wear different clothing.[110]

However, situations may arise in which no alternative material or method is available or in which an available alternative is so expensive or administratively burdensome that it would be unreasonable to require school officials to offer it to a student. In such cases officials should consider whether to excuse the student entirely from the unit, subject, or activity in question. In responding to such situations, officials should take into account the importance of the challenged material or method, whether the student's challenge pertains to a peripheral or core course, and the administrative feasibility of excusal.

In some cases a challenged material or method might play such a minor, supplemental role in instruction that some form of excusal would be appropriate from classes using that material or method, even if no other comparable material or method is available for the student. For example, in *Davis v. Page*,[111] a student requested the right under the free exercise clause to leave the classroom when instructional films were shown. A federal district court found that films were used in numerous courses and that the administrative burden school officials would face in supervising excused students would be excessive. Instead, the court upheld the officials' decision to offer a limited excusal right: students who objected would have to remain in the classroom, but they would be excused from watching films.[112]

Even if the challenged material or method plays an important role in teaching and no alternative is reasonably available, excusal might be appropriate if the course or unit involved is peripheral to the curriculum. For example, in *Grove* the teacher permitted the student who objected to leave the classroom during discussion of the single contested novel.[113]

The most challenging cases involve religious objections by students to materials or methods used throughout a course or unit that plays an integral role in the curriculum. In such cases it can be difficult to strike a proper balance between the student's free exercise rights and the school officials' interest in provid-

110. Mitchell v. McCall, 273 Ala. 604, 143 So. 2d 629 (1962).

111. The court also ruled that students who object have a free exercise right to leave the classroom when a teacher shows "entertainment" films rather than "instructional" films.

112. *See also* Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979) (suggesting that school authorities could accommodate a student's religious objection to taking a coeducational physical education class with "immodestly" dressed members of the opposite sex by exempting the student from the class); Mitchell v. McCall, 273 Ala. 604, 143 So. 2d 629 (1962) (suggesting that school officials could accommodate a student's religious objection to taking part in particular physical education exercises by excusing the student from those exercises).

113. 753 F.2d 1528 (9th Cir.), *cert. denied*, 106 S. Ct. 85 (1985).

ing sound education. The case of *Mozert v. Hawkins County Public Schools*[114] illustrates the problems school officials can face in these situations.

In *Mozert* a group of fundamentalist Christian parents and students in Tennessee found that a substantial amount of material in the required reading texts used in elementary and middle schools in their district offended their religious beliefs. They sued the school board in federal district court, contending that the required use of that reading series violated their right to free exercise of religion by forcing the children to read books that allegedly promoted ideas and values they found objectionable on religious grounds. They asked the court to order the school board to provide the students with alternative texts.

As instructed by a federal appellate court, the district court judge analyzed the case by addressing three questions: (1) whether the parents and children had sincere religious beliefs; (2) whether mandatory use of the readers burdened the plaintiffs' exercise of their faith; and (3) whether mandatory use of the series was the least restrictive way in which the school board could fulfill its interest in teaching all students to read proficiently. The judge found that the plaintiffs had sincere religious beliefs. He also agreed with the plaintiffs that the required use of the challenged texts burdened their exercise of their faith by forcibly exposing the children to ideas and values offensive to their religion. The judge then concluded that the school board's task of providing sound reading education for all children did not require uniform use of the challenged reading series, noting that the state-approved list of reading texts authorized school boards to use other readers and that Tennessee law authorized private school and home instruction without use of that series. In short, the judge found that required use of the challenged readers violated the plaintiffs' rights under the free exercise clause.

In fashioning a remedy, however, the judge did not grant the plaintiffs' request that the school board be ordered to provide alternative reading classes with different texts. He explained that such a remedy would impose undue educational and administrative hardship on the school system and might violate the establishment clause by tailoring reading instruction to the plaintiffs' religious beliefs. To accommodate the plaintiffs' rights and the school board's interests, the judge decreed the following resolution to the dispute: the plaintiff students would have a choice of remaining in standard reading classes in the public schools and using the challenged texts or leaving the reading classes entirely and studying reading privately outside public school. Students who opted out would go to the library or study hall during reading class and would take standardized tests periodically to permit school officials to follow their reading development.

---

114. 647 F. Supp. 1194 (E.D. Tenn. 1986), rev'd, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988).

The United States Court of Appeals for the Sixth Circuit reversed the district court judge's compromise solution. The three appellate judges differed slightly in their written analyses of the case, but they shared the view that while the free exercise clause forbids public officials to coerce people to affirm ideas that conflict with their religious beliefs, it does not protect people from mere exposure to such beliefs. One judge also noted a practical factor in the school board's favor: the Hawkins County Elementary School curriculum is designed to integrate reading instruction into other teaching throughout the day—for example, by using stories from the reading texts in teaching other subjects. The district judge's opt-out remedy would undermine such educationally valuable integration.

Although the Sixth Circuit freed the Hawkins County school board from the district court's opt-out mandate, the appellate court's ruling does not prevent a board from voluntarily adopting such opt-out procedures as a way to accommodate students' religious beliefs. If it is educationally and administratively feasible to sever a course or unit from the rest of the curriculum for private or home instruction, a school board may still permit students who object to opt out of the course or unit. But it should be noted that the district court's approach in *Mozert* would not be appropriate with some methods or materials used in key courses or units. For example, a school board might consider it educationally unsound to sever some courses (such as mathematics or social studies) or units (such as units about the United States Constitution) from the curriculum. Also, standardized tests—cited by the district judge in *Mozert* as tools to monitor the progress of students who opt out of reading class—are not available at some grade levels for some subjects. When an opt-out solution would not be feasible, the school board's interest in providing a sound education to all public school students—including the very students who challenge materials or methods on religious grounds—should outweigh the free exercise rights of parents and students who object to insist on *Mozert*-style excusal arrangements. In such cases the free exercise clause should not preclude school officials from refusing an opt-out request. The only option left to such parents and students would be full-time private schooling or home instruction acceptable to their faith.

Although most litigation about religious objections to materials or methods have involved only the free exercise clause, two interesting cases illustrate a different strategy used by some students and parents challenging the materials or methods under the establishment clause. In these cases the challengers have argued that the materials or methods in question violated the establishment clause by promoting secular humanist beliefs.

In *Grove v. Mead School District No. 354*,[115] the United States Court of Appeals for the Ninth Circuit rejected a challenge by taxpayers and a parent to

115. 753 F.2d 1528 (9th Cir.), *cert. denied*, 106 S. Ct. 85 (1985).

the use of a particular novel—*The Learning Tree*—in an English literature curriculum for high school sophomores. The novel depicts life from the perspective of a teenage boy in a working-class black family. A student and her mother told the teacher that the book was offensive to their fundamentalist Christian faith and asked that the book be removed from the curriculum. As discussed above, the teacher refused their request, but she permitted the girl to read another book. The teacher also allowed her to leave the classroom while the class discussed the novel, though she decided to remain.

The girl's mother and associates sued the school district and argued in court that the use of the book violated the establishment clause by promoting antireligious secular humanist values, thereby breaching the government's duty to act neutrally toward religion. The appeals court disagreed, pointing out that the book was religiously neutral and was used in class in a religiously neutral fashion. A thoughtful concurring opinion illuminates the court's establishment clause analysis. First, the concurring judge rejected the underlying premise of the challengers' argument: that all ideas are either religious or antireligious. Some ideas, he maintained, fall within a third category of secular, nonreligious thought. Second, even if a book promotes or criticizes particular religious beliefs, that fact does not by itself determine whether study of the book violates the establishment clause. Rather, the key question is whether the teacher uses the book in a way that endorses or criticizes religious beliefs.[116] As the judge observed,

> [I]nclusion of *The Learning Tree* as representative of a particular literary genre neither religiously inhibits nor instills, but simply informs and educates students on a particular social outlook forged in the crucible of black rural life. To include the work no more communicates governmental endorsement of the author's or characters' religious views than to assign *Paradise Lost*, *Pilgrim's Progress*, or *The Divine Comedy* conveys endorsement or approval of Milton's, Bunyan's, or Dante's Christianity.[117]

An even broader establishment clause challenge failed in *Smith v. Board of School Commissioners of Mobile County*.[118] The plaintiffs in *Smith* contended that forty-four particular history, social studies, and home economics textbooks promote secular humanism as a religious faith and, therefore, that their use in the Alabama public schools violates the establishment clause. The federal district court agreed with them and banned the books from Alabama class-

116. This focus on the instructional content of an activity follows the contextual analysis used in Lynch v. Donnelly, 465 U.S. 668 (1984), and Florey v. Sioux Falls School Dist. 49-5, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).

117. 753 F.2d at 1540-41.

118. 655 F. Supp. 839 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

rooms. The district judge found that secular humanism is a religion and that the books promote it either by affirmatively supporting its views or by systematically omitting discussion of theistic religion.

The district judge's view that the home economics texts affirmatively promote secular humanism seems flawed. Secular humanism indeed exists as an ideology with an official organization (the American Humanist Association) and official statements of its tenets (*Humanist Manifesto I*, written in 1933, and *Humanist Manifesto II*, written in 1980-1981) that characterize secular humanism as an atheistic religion. The court's finding that secular humanism is a religion draws some support from other court decisions[119] and from the characterization of secular humanism as a religion by the two humanist manifestos. Moreover, some statements and sections in the challenged home economics textbooks concerning education about values (such as the relative nature of values and the importance of a student's developing his own personal value system) correspond to tenets of secular humanism. However, mere congruence between a nonreligious view and a religious belief does not automatically transform the nonreligious view into a religious belief.[120] For example, the fact that our homicide law and the Ten Commandments both prohibit unjustified killing does not convert the homicide law into a religious doctrine, since the homicide law also rests on our society's secular abhorrence of unjustified killing. Similarly, although the theory of evolution and a relativist theory of moral values are supported by secular humanism, a person could agree with both of those theories without being a secular humanist. In short, the court in *Smith* mistakenly concluded that the challenged home economics textbooks were secular humanist books on the basis of mere correspondence between some portions of the books and some tenets of secular humanism.

The court's determination that the omission of reference to theistic religion in the challenged history and social studies texts violates the establishment clause might have merit, at least in regard to some of the books. For instance, one of the challenged social studies textbooks is a second-grade book that discusses the Pilgrims' settlement of Plymouth as an example of building a community. The book does not mention the Pilgrims' reasons for leaving England, the central role of religion in their community, or the religious purpose of their Thanksgiving feast. Knowing these facts is important to understanding the nature of the Pilgrims' community (though perhaps not necessary to understanding the general concept of a community). They can be discussed objectively as matters of history, without endorsing or criticizing the Pilgrims' religious beliefs or practices. At some point excision of religion from a textbook—when neutral, nonindoctrinating discussion of religion is plainly relevant to an ob-

119. Torcaso v. Watkins, 367 U.S. 488, n.11 (1961); Malnak v. Yogi, 592 F.3d 197, 212 (3d Cir. 1979) (Adams, J., concurring).

120. McGowan v. Maryland, 366 U.S. 420, 442 (1961).

jective treatment of a subject—might violate the establishment clause—not necessarily by promoting the faith of secular humanism, but simply by conveying hostility toward theistic religion.[121]

On appeal, the United States Court of Appeals for the Eleventh Circuit reversed the district judge's decision in *Smith*. The appellate court assumed—for the sake of argument only—that secular humanism is a religion. Nevertheless, it then found that use of the disputed home economics texts does not promote secular humanism as its primary effect. Rather, the court observed, the books promote "such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making." Although these values might be consistent with tenets of secular humanism, the court applied the principle discussed above: mere consistency between a nonreligious view and a religious belief does not convert the nonreligious view into a religious belief. The appeals court concluded that the home economics books are neutral rather than hostile toward religion.

As for the history and social studies texts, the court ruled that the mere absence of a more thorough treatment of religion's role in American history and culture does not convey either endorsement of secular humanism or disapproval of theistic religions. The court also found that school officials selected these books for adequate nonreligious reasons, such as overall relevance to the curriculum or quality of writing. Further, the court pointed out that teachers remain free to use other materials to supplement the textbooks' treatment of religion. The court concluded that even if the textbooks are educationally inadequate, their educational flaws do not render them constitutionally deficient under the establishment clause. It stressed that courts should defer to the judgment of school officials in assessing the educational quality of texts unless officials wrongly base textbook selection on religious criteria.

D. Conclusion

In the realm of First Amendment case law, court decisions governing the role of religion in public school curriculum exhibit general consistency. This uniformity offers school officials a valuable opportunity to distill coherent, practical lessons from court opinions. The establishment clause permits any instruction—including instruction about the controversial topics of religion, evolution, and sex education—that, by virtue of its form and content, serves secular educational goals. But the establishment clause forbids instruction or the tailoring of instruction with the purpose or primary effect of instilling religious beliefs in children. Although the free exercise clause protects parents and students who oppose such secular instruction, their sole remedy under that clause is partial or total exemption from the courses, not abolition or dilution of the courses.

121. Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

Chapter 5

RELIGIOUS ACTIVITY BY PERSONNEL

A. Prayer

As discussed above, a teacher or other public school employee may not organize or participate in prayer by students in class during the curricular or extracurricular school day. Still, the question arises whether a school employee may pray, either alone or with other employees, on school grounds during the school day. Although no cases appear to have addressed the issue of private prayer or reading of religious literature by a single employee during the school day, it would seem that such activity is constitutional as long as it does not interfere with official school activities. That is, school officials can limit this type of activity to free periods during which employees have no official duties or during which employees are permitted to engage in activities of their own choosing, such as reading or reflection. In addition, school officials can limit private religious activity of employees to activity that does not disrupt students or other employees.

One case from Indiana has addressed the related issue of prayer meetings held by groups of employees on school grounds during the school day.[122] The United States Court of Appeals for the Seventh Circuit upheld a school board policy prohibiting twenty-minute weekly prayer meetings conducted by employees in a guidance office before official duty began. Although the court acknowledged that school administrators allowed employees to hold isolated, informal conversations at school (the types of conversations that "occur in any workplace"), it concluded that the prayer meetings were different because they were formal, organized, regular meetings. The court explained, "[A] private conversation has a different significance from a regularly scheduled group meeting devoted to a particular subject. . . . A public employer does not, by permitting its employees to use their lunch breaks or coffee breaks or other down time during the workday to talk to each other, turn over its premises to the employees for organized and scheduled meetings on topics unrelated to work."[123] While the court did not require the board to prohibit the prayer meetings, it upheld the board's policy to ban them.

122. May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105 (7th Cir. 1985).
123. *Id.* at 1110.

The court's decision seems to be incorrect. It wrongly focused on the regular nature of the meetings, thereby missing the sole pertinent issue: the unofficial nature of the sessions. By permitting employees to discuss other issues during free periods, school administrators had opened up the school as either a designated public forum or a limited public forum for unofficial, nondisruptive employee discussions. The subject of such discussions—movies, sports, recipes, or religion—is irrelevant. Furthermore, since the meetings were unofficial and closed to students, they could not reasonably be interpreted as signaling the school's endorsement of religion in violation of the establishment clause. By prohibiting the meetings, the school board infringed on the free exercise rights of the employees and violated their rights to freedom of speech by singling out only religious speech for prohibition. The free speech clause of the First Amendment should permit employees to hold prayer meetings during free periods as long as the meetings are voluntary, unofficial, and nondisruptive.[124]

B. Discussion of Religion with Students

Occasionally, a teacher may want to discuss religion with a student on school grounds during the school day. Previous sections have already indicated that a teacher may not organize or participate in student religious activities on school grounds during the school day, but a teacher may discuss religion in a neutral manner (neither endorsing nor criticizing particular religious beliefs) when religion is relevant to secular school activities.

For example, a student's question in a literature class may warrant a teacher's explanation of a religious allusion in a novel or poem. A teacher could even mention his own religious beliefs if such mention is relevant to an official activity and is done in a neutral manner. For example, a Jewish teacher's faith could be relevant to a discussion of the Holocaust in a history class, and a teacher's religious practices could be relevant to a neutral discussion of religious holiday observances. In such instances a teacher should take care to explain to students that his reference to religion or to his own religious faith is not intended to endorse or criticize any religious beliefs. The establishment clause plainly prohibits a teacher from using his position to proselytize among students or otherwise to endorse or criticize religious beliefs. For example, a court in New York upheld a school board's dismissal of a high school teacher who used his classroom during the school day to proselytize among students, to encourage them to read the Bible, to recruit students for his religious group,

124. *See, e.g.*, Texas State Teachers' Ass'n v. Garland Indep. School Dist., 777 F.2d 1046 (5th Cir. 1985) (holding that school employees have free speech right to discuss labor matters informally during nonclass school hours).

and to urge students to disregard their parents' wishes about religion.[125] This prohibition against religious indoctrination is not limited to a teacher's classroom work. It applies to all activities in which any employee engages during the curricular and extracurricular school day on school grounds—that is, to all functions in which an employee acts or appears to act as an agent of the school board.

C. Wearing Religious Apparel or Religious Symbols

The wearing of distinctive religious clothing or religious symbols can be a sensitive and difficult personnel matter. Courts around the country have not reached a consensus on this issue. One court held that a teacher may wear such garb or insignia.[126] Others have ruled that a teacher may wear religious clothing or symbols unless prohibited by a statute or regulation as long as he does not inject his religious beliefs into instruction.[127] These courts have reasoned that such attire merely expresses the unobjectionable fact of a teacher's religious affiliation and does not, by itself, promote the teacher's religious beliefs. One court decided that a teacher may not wear such clothing or insignia, even in the absence of a prohibiting statute or regulation, because the daily presence in the classroom of a distinctively attired authority figure acts as a subtle but effective form of religious indoctrination.[128] However, no court has addressed the constitutional issue of whether a teacher has a right under the free exercise clause to wear religious apparel or insignia. Under the free exercise clause, a teacher probably would have such a right unless school authorities could show that a prohibition against wearing such garb or symbols is the least restrictive means of preventing religious indoctrination by the teacher. Although religious clothing and symbols surely have some potential for indoctrination, school officials should consider the less restrictive option mentioned by some courts of ensuring that a teacher's religious beliefs do not affect the content of instruction. As an additional precaution, the teacher might consider telling students and parents outright that his wearing of religious clothing or symbols simply expresses his religious beliefs and will not improperly affect his relations with students.

125. La Rocca v. Board of Educ. of Rye City School Dist., 63 App. Div. 2d 1019, 406 N.Y.S.2d 348 (N.Y. App. Div. 1978). *See also* Knowlton v. Baumhower, 182 Iowa 691, 166 N.W. 202 (1918).

126. State *ex rel.* Johnson v. Boyd, 217 Ind. 348, 28 N.E.2d 256 (1940).

127. Gerhardt v. Heid, 66 N.D. 444, 267 N.W. 127 (1936); Rawlings v. Butler, 290 S.W.2d 801 (Ky. Ct. App. 1956); Moore v. Board of Educ., 4 Ohio Misc. 257, 33 Ohio Op. 2d 406, 212 N.E.2d 833 (Ohio Ct. C.P. 1965). *See also* O'Connor v. Hendrick, 184 N.Y. 421, 77 N.E. 612 (1906) (upholding state regulation prohibiting teachers from wearing religious apparel).

128. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

D. Leave for Religious Reasons

Both the free exercise clause and Title VII of the Civil Rights Act of 1964[129] require school boards to make reasonable accommodations to employees' religious needs, including requests for religious leave. Although a board must make reasonable efforts to accommodate these requests, it need not incur undue hardship in order to do so.[130] No simple formula exists to guide school authorities in determining the scope of an employee's right to religious leave. Each case much be considered individually. However, a review of cases concerning this issue shows that courts have considered the following factors: whether the employee is seeking paid or unpaid leave, the amount of leave requested, the difficulty and expense of hiring a qualified substitute teacher, and the amount of leave available for other reasons. Courts generally have ruled in favor of teachers who request only unpaid leave. For example, the California Supreme Court struck down a school board's dismissal of an elementary school teacher who, as a member of the Worldwide Church of God, had requested from five to ten days of unpaid leave each year for three years to observe religious holidays.[131] Most of the absences fell on consecutive dates and the teacher prepared detailed lesson plans before each absence for use by substitute teachers. Neighboring school districts permitted such leave, and the number of days the teacher requested did not exceed the maximum amount of leave permitted by California law for illness or personal necessity. When the board denied his requests, the teacher took unauthorized leave. After he had accumulated thirty-one unexcused absences over the course of a few years, the board dismissed him. In reversing the board's action, the court found that in the circumstances of this case, the board would not have incurred undue hardship by honoring the teacher's requests.[132]

The law regarding requests for paid religious leave is not settled. The United States Court of Appeals for the Tenth Circuit upheld a school board policy that permitted teachers to take two days of paid leave each year for religious reasons (out of an annual total of twelve days of paid leave) and allowed them to take unpaid leave for additional religious holidays.[133] The teacher in this case sought only one additional day of paid religious leave (a total of three days of paid religious leave). The court ruled that the economic impact of losing

129. 42 U.S.C. § 2000e-2(a)(1) (1976).

130. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

131. Rankin v. Commission on Professional Competence, 24 Cal. 3d 167, 154 Cal. Rptr. 907, 593 P.2d 852 (1979).

132. *See also* Neiderhuber v. Camden County Vocational and Tech. School Dist. Bd. of Educ., 495 F. Supp. 273 (D.N.J. 1980), *aff'd mem.* 671 F.2d 496 (3d Cir. 1981); Edwards v. School Bd., 483 F. Supp. 620 (W.D. Va. 1980), *vacated on other grounds*, 658 F.2d 951 (4th Cir. 1981); Wangsness v. Watertown School Dist. No. 14-4, 541 F. Supp. 332 (D.S.D. 1982).

133. Pinsker v. Joint Dist. No. 285, 735 F.2d 388 (10th Cir. 1984).

only a single day's pay was so minimal that it did not constitute such a substantial burden on the teacher's religious faith as to deny him his right to free exercise of religion. It did not require the board to accommodate the teacher's request for an additional day of paid leave.

In a case decided by the United States Supreme Court, *Ansonia Board of Education v. Philbrook*,[134] a teacher challenged a collective bargaining agreement permitting teachers to take up to eighteen days of accumulated paid sick leave each year for certain purposes, with a maximum of three of those days for observance of religious holidays; teachers could take additional religious days as unpaid leave. The contract also permitted teachers to take up to three days of accumulated paid sick leave for "necessary personal business," though such days could not be used for purposes specifically authorized by the contract—including religious observances. The teacher requested approximately six days of paid leave each year to observe holy days of his faith, proposing two alternative plans. First, he suggested that the board allow him to use personal business leave for religious observance. As an alternative, he offered to pay the full cost of a substitute teacher for religious leave exceeding three days (less than the pay the teacher otherwise would forfeit), to supervise the substitute, and to make up for days missed by performing school work at other times. The board rejected both proposals. The Supreme Court ruled that while Title VII requires an employer to make a reasonable accommodation to an employee's religious needs, it does not require an employer to adopt any specific reasonable accommodation (such as the specific accommodations proposed by Philbrook). The Court sent the case back to the federal district court to decide whether the leave provisions in the collective bargaining agreement offer a reasonable accommodation to Philbrook's needs or whether they discriminate in favor of secular use of "necessary personal business" leave against religious use of such leave. The Supreme Court offered the following general principles to the district court (and to employers such as school boards): "Unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes except religious ones. A provision for paid leave 'that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all. . . .' "[135]

A careful review of the Supreme Court's decision in *Philbrook* suggests the following points: Title VII probably would permit a school board to prohibit employees from taking any paid personal leave. But if a board allows some amount of paid leave, then it must let employees use as much paid leave for religious purposes as it would let them use for *similar* secular purposes (such

134. 93 L. Ed. 2d. 305 (1986).
135. *Id.* at 316.

as attending meetings of secular organizations). Also, if a school board permits employees to take a specified number of days of paid leave without limiting the permitted purposes of such leave, it may not single out religious uses of such leave for prohibition. Once a board has accommodated employees' religious needs according to such nondiscriminatory criteria, it probably can require employees to take any additional religious leave as unpaid leave.

Chapter 6

OTHER RELIGIOUS ACTIVITIES ON SCHOOL GROUNDS

A. Prayer at School Board Meetings

The United States Supreme Court has ruled that the establishment clause does not prohibit the offering of a prayer by a publicly paid chaplain as a daily invocation for a state legislature.[136] Using an analysis similar to that used by lower courts in upholding graduation prayer, the Court explained that this type of prayer merely constitutes a traditional custom that neither proselytizes nor places the legislature's official seal of approval on particular religious beliefs. The Court's opinion makes it clear that it applies not only to sessions of legislatures but also to meetings of "other deliberative public bodies."[137] School board meetings should fall within that category.[138]

B. Use of School Facilities by Outside Groups

Courts around the nation seem to be reaching a consensus on whether non-student religious groups have a right to use public school facilities for worship or other kinds of meetings. A school board may close its doors entirely to community groups, including religious groups, but if it permits one community group to use school facilities for meetings, then the free speech clause of the First Amendment requires it to grant access on identical terms to other community groups, including religious groups. In other words, if a board allows political, social, or charitable community organizations to conduct meetings on school grounds, it must give the same right to religious groups.[139] As the courts have explained, allowing equal access has the valid secular purpose of enhancing community use of school facilities for the benefit of all residents.[140] Also, while granting access to religious groups undeniably benefits such groups,

136. Marsh v. Chambers, 463 U.S. 783 (1983).

137. *Id.* at 786.

138. The Court hinted, however, that prayer used to advance particular sectarian beliefs might violate the establishment clause. *Id.* at 794-95.

139. Country Hills Christian Church v. Unified School Dist. No. 512, 560 F. Supp. 1207 (D. Kan. 1983). The Supreme Court's decision in Widmar v. Vincent, 454 U.S. 263 (1981), discussed in Chapter 2, supports this position. For a summary of earlier cases on this issue, see Annot. 79 A.L.R.2d 1148 (1961).

140. Resnick v. East Brunswick Township Bd. of Educ., 77 N.J. 88, 109, 389 A.2d 944, 954 (1978).

it does so only incidentally. An equal-access policy benefits all community groups generally, without singling out any particular group; a religious group would receive a benefit without regard to its religious character.[141] Finally, use of school facilities by religious groups need not require entanglement by school officials other than requiring the same clerical, security, and maintenance operations performed in connection with use by any community groups.[142]

School authorities should take care to avoid the appearance of school support for religious groups that meet in school facilities. For example, meetings should be conducted separately from curricular and extracurricular programs and should not be permitted to disrupt official school activities. Religious groups should pay any rental fee charged to other groups. In one case a court also suggested that to prevent excessive entanglement between schools and religious groups, school boards should not permit a religious group to use a school facility on a permanent basis.[143]

141. Resnick, 77 N.J. at 111, 389 A.2d at 955; Country Hills Christian Church v. Unified School Dist. No. 512, 560 F. Supp. 1207, 1218 (D. Kan. 1983); Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697, 700 (Fla. 1959).

142. Country Hills Christian Church v. Unified School Dist. No. 512, 560 F. Supp. 1207, 1218 (D. Kan. 1983).

143. Resnick v. East Brunswick Township Bd. of Educ., 77 N.J. 88, 117, 389 A.2d 944, 958 (1978); *accord*, Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697, 700 (Fla. 1959).

Appendix I

THE EQUAL ACCESS ACT

Short Title

Sec. 801. This title may be cited as "The Equal Access Act."

Denial of Equal Access Prohibited

Sec. 802. (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof—

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

Definitions

Sec. 803. As used in this title—

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

Severability

Sec. 804. If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other person or circumstances shall not be affected thereby.

Construction

Sec. 805. The provisions of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this title.

353

Map of
the Thirteen Federal Judicial Circuits

Appendix II

INDEX

Athletic events, prayer at, 16
Baccalaureate services, 16
Bible
  distribution to students, 20
  study in class, 23
Creation science, 32
Creationism, 31
Curriculum, religion in, 23
Discussion of religion with students, 45
Distribution of literature, 20
Equal Access Act, 10, 52
Evolution, 31
Extracurricular student religious clubs, 6
Facilities, use by religious groups, 50
First Amendment
  establishment clause, generally, 1
  free exercise clause, generally, 1
  free speech clause, 7, 45
Graduation prayer, 13
Instructional materials and methods, 37
Leave for religious reasons, 47
Literature, distribution to students, 20
Moment of silence, 5
Personnel, religious activity by
  athletic events, 16
  discussion of religion with students, 45
  extracurricular student religious clubs, 6
  leave for religious reasons, 47
  moment of silence, 5
  prayer, 4, 44
  wearing religious apparel or symbols, 46
Prayer
  athletic events, 16
  extracurricular religion clubs for students, 6
  graduation, 13
  moment of silence, 5
  personnel, 44
  private, 5, 44
  school board meetings, 50
  students, 4
Released time, 24
Religion courses, 23
Religious apparel or symbols worn by personnel, 46
Religious holidays
  classroom observance, 19
  personnel leave, 47
Religious symbols
  display in classroom, 17
  wearing by teachers, 46
Scientific creationism, 31
Secular humanism, 32, 35, 36, 39, 41
Sex education, 36
Students
  distribution of religious literature to, 20
  moment of silence, 5
  prayer, 4
Teachers, religious activity by
  discussion of religion with students, 45
  extracurricular student religious clubs, 6
  leave for religious reasons, 47
  prayer, 4, 44
  wearing religious apparel or symbols, 46

STATUTES CITED

U.S. Const., amend. I ..... 1, *et seq.*
42 U.S.C. § 1983, Civil Rights Act of 1871 11
42 U.S.C. § 2000e-2(a)(1), Civil Rights Act of 1964 47
Pub. Law No. 98-377, Equal Access Act 80, 52

ARIZ. REV. STAT. ANN. § 15-522 (West 1984) 6
CONN. GEN. STAT. ANN. § 10-16a (West 1986) 6
N.C. GEN. STAT. 115C-47(29) (1987) 6

CASES CITED

Ambach v. Norwick, 441 U.S. 68 (1979) 23
Ansonia Bd. of Educ. v. Philbrook, 93 L.Ed.2d 305 (1986) 48
Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982) 5
Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985) 8
Bender v. Williamsport Area School Dist., 536 F. Supp. 697 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (3d Cir. 1984), *rev'd*, 106 S. Ct. 1326 (1986) 8, 9, 10
Bennett v. Livermore Unified School Dist., 193 Cal. App. 3d 802, 238 Cal. Rptr. 809 (Cal. Ct. App. 1987) 15
Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982) 23
Brandon v. Board of Educ. of Guilderland, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) 7, 8, 9
Brown v. Orange County Bd. of Pub. Instruction, 128 So. 2d 181 (Fla. Ct. App. 1960) 20
Cantwell v. Connecticut, 310 U.S. 296 (1940) 1
Cason v. City of Jacksonville, 497 F.2d 949 (5th Cir. 1974) 12
Church of God v. Amarillo Indep. School Dist., 511 F. Supp. 613 (N.D. Tex. 1981), *aff'd per curiam*, 670 F.2d 46 (5th Cir. 1982) 19
Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975), *appeal dismissed*, 425 U.S. 908 (1976) 36
Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981) 5
Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970) 36
Country Hills Christian Church v. Unified School Dist. No. 512, 560 F. Supp. 1207 (D. Kan. 1983) 13, 50, 51
Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983) 29, 30, 31, 36
Crowley v. Smithsonian Inst., 636 F.2d 738 (D.C. Cir. 1980) 35
Daniels v. Waters, 515 F.2d 485 (6th Cir. 1975) 34
Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974) 37, 38
Doe v. Aldine Indep. School Dist., 563 F. Supp. 883 (S.D. Tex. 1982) 15, 17
Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 103 (D.N.M. 1983) 5
Edwards v. Aguillard, 107 S. Ct. 2573 (1987) 33, 34, 35
Edwards v. School Bd., 483 F. Supp. 620 (W.D. Va. 1980), *vacated on other grounds*, 658 F.2d 951 (4th Cir. 1981) 47
Engel v. Vitale, 370 U.S. 421 (1962) 4, 5, 18, 20
Epperson v. Arkansas, 393 U.S. 97 (1968) 2, 23, 31, 32, 34, 35
Florey v. Sioux Falls School Dist. 49-5, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) 17, 18, 19, 22, 41
Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976) 5

Gerhardt v. Heid, 66 N.D. 444, 267 N.W. 127 (1936) 46
Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973) 22
Goldman v. Weinberger, 106 S. Ct. 1310 (1986) 2
Goodwin v. Cross County School Dist. No. 7, 394 F. Supp. 417 (E.D. Ark. 1973) 16, 20
Graham v. Central Community School Dist., 608 F. Supp. 531 (D. Iowa 1985) 15
Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974) 13, 14
Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir.), *cert. denied*, 106 S. Ct. 85 (1985) 37, 38, 40
Hall v. Board of School Comm'rs, 656 F.2d 999 (5th Cir. 1981) 28
Hardwick v. Board of School Trustees, 54 Cal. App. 696, 205 P. 49 (Cal. Ct. App. 1921) 37
Hernandez v. Hanson, 430 F. Supp. 1154 (D. Neb. 1977) 20
Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046 (1987) 2
Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) 23, 24, 25, 28
Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 105 S. Ct. 2479 (1985) 5
Jager v. Douglas County School Dist., No. C86-203TA (N.D. Ga. Feb. 3, 1987) 17
Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977) 7, 8
Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981) 5
Kent v. Commissioner of Educ., 380 Mass. 235, 402 N.E.2d 1340 (1980) 5
Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd., 578 F.2d 1122 (5th Cir. 1978) 12
Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918) 46
La Rocca v. Board of Educ. of Rye City School Dist., 63 App. Div. 2d 1089, 406 N.Y.S.2d 348 (N.Y. App. Div. 1978) 46
Lemon v. Kurtzman, 403 U.S. 602 (1971) 2, 4, 7, 9, 15, 16, 17, 33
Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978) 22
Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983) 8, 9
Lynch v. Donnelly, 465 U.S. 668 (1984) 2, 18, 41, 43
Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) 35, 42
Marsh v. Chambers, 463 U.S. 783 (1983) 9, 15, 50
May v. Cooperman, 780 F.2d 240 (3d Cir. 1985), *appeal dismissed sub nom.* Kutcher v. May, 108 S. Ct. 388 (1987) 6
May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105 (7th Cir. 1985) 44
McGowan v. Maryland, 366 U.S. 420 (1961) 42
McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982) 32, 33, 34
Medeiros v. Kiyosaki, 52 Hawaii 436, 478 P.2d 314 (1970) 36
Meltzer v. Board of Pub. Instruction of Orange County, 577 F.2d 311 (5th Cir. 1978) (en banc) (per curiam), *cert. denied*, 439 U.S. 1089 (1979) 20
Mitchell v. McCall, 273 Ala. 604, 143 So. 2d 629 (1962) 37, 38
Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979) 37, 38
Mooney v. Board of Educ., 4 Ohio Misc. 257, 33 Ohio Op. 2d 406, 212 N.E.2d 833 (Ohio Ct. C.P. 1965) 46
Mozert v. Hawkins County Pub. Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986), rev'd, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988) 37, 39, 40
Narkowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984) 8
National Socialist White People's Party v. Rutgers, 473 F.2d 1080 (4th Cir. 1973) 12
Neiderhuber v. Camden County Vocational and Tech. School Dist. Bd. of Educ., 495 F. Supp. 273 (D.N.J. 1980), *aff'd mem.* 671 F.2d 496 (3d Cir. 1981) 47
O'Connor v. Hendrick, 184 N.Y. 421, 77 N.E. 612 (1906) 46
Palmer v. Board of Educ., 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980) 35
Parodi v. Fort Worth Indep. School Dist., 453 S.W.2d 888 (Tex. Ct. App. 1970) 12
Patsker v. Joint Dist. No. 285, 735 F.2d 388 (10th Cir. 1984) 47
Rankin v. Commission on Professional Competence, 24 Cal. 3d 167, 154 Cal. Rptr. 907, 593 P.2d 852 (1979) 47
Rawlings v. Butler, 290 S.W.2d 801 (Ky. Ct. App. 1956) 46
Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965) 7

Resnick v. East Brunswick Township Bd. of Educ., 77 N.J. 88, 389 A.2d 944 (1978) 13, 50, 51
Robinson v. Sacramento City Unified School Dist., 53 Cal. Rptr. 781 (Cal. Ct. App. 1966) 12
School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) 1, 3, 4, 5, 13, 18, 20, 23, 24, 28, 29, 35
Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927) 31, 34
Sherbert v. Verner, 374 U.S. 398 (1963) 1
Smith v. Board of School Comm'rs of Mobile County, 655 F. Supp. 834 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987) 41, 42, 43
Smith v. Ricci, 89 N.J. 514, 446 A.2d 501 (1983) 36
Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697 (Fla. 1959) 13, 51
Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972) 30
State *ex rel.* Johnson v. Boyd, 217 Ind. 348, 28 N.E.2d 256 (1940) 46
Stein v. Plainwell Community Schools, 680 F. Supp. 43 (W.D. Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987) 14
Stone v. Graham, 449 U.S. 39 (1981) 17, 18
Student Coalition for Peace v. Lower Merion School Dist., 776 F.2d 431 (3d Cir. 1985) 12
Texas State Teachers' Ass'n v. Garland Indep. School Dist., 777 F.2d 1046 (5th Cir. 1985) 45
Thomas v. Review Bd., 450 U.S. 707 (1981) 1
Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) 12
Torcaso v. Watkins, 367 U.S. 488 (1961) 26, 42
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) 47
Trietley v. Board of Educ. of Buffalo, 65 App. Div. 2d 1, 409 N.Y.S.2d 912 (N.Y. App. Div. 1978) 7, 8
Tudor v. Board of Educ., 41 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954) 20
United States v. Seeger, 380 U.S. 163 (1965) 35
Vaught v. Reed, 313 F. Supp. 431 (W.D. Va. 1970) 28, 29, 30
Wallace v. Jaffree, 105 S. Ct. 2479 (1985) 5, 6
Wangsness v. Watertown School Dist. No. 14-4, 541 F. Supp. 332 (D.S.D. 1982) 47
Weist v. Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362, *cert. denied*, 419 U.S. 967 (1974) 14
West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 22, 23
Widmar v. Vincent, 454 U.S. 263 (1981) 7, 8, 9, 10, 50
Wiley v. Franklin, 468 F. Supp. 133 (E.D. Tenn. 1979); Wiley v. Franklin II, 474 F. Supp. 525 (E.D. Tenn. 1980); Wiley v. Franklin III, 497 F. Supp. 390 (E.D. Tenn. 1980) 24, 25, 26, 27, 28, 29, 30, 31
Wisconsin v. Yoder, 406 U.S. 205 (1972) 1
Wood v. Mt. Lebanon Township School Dist., 342 F. Supp. 1294 (W.D. Pa. 1972) 14
Wright v. Houston Indep. School Dist., 366 F. Supp. 1208 (S.D. Tex. 1972) 32, 33, 36
Zorach v. Clauson, 343 U.S. 306 (1952) 24
Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951) 46